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No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL TRADE COMMISSION, PETITIONER

v.

OFFICIAL AIRLINE GUIDES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the Federal Trade Commission may find that a company with monopoly control over a resource, which is essential to competitors doing business in an adjacent market in which the monopolist itself does not compete, violates Section 5 of the Federal Trade Commission Act by discriminatorily denying a class of competitors access to that resource when the denial has no business justification and causes substantial injury to competition in the adjacent market.

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The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–16a) is not yet reported. The opinion and order of the Federal Trade Commission (App. C, *infra*, 19a–82a) and the initial decision of the administrative law judge (App. D, *infra*, 83a–153a) are not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 17a–18a) was entered on September 18, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent portions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 2 of the Sherman Act, 15 U.S.C. 2, are set forth in Appendix E, *infra*, 154a.

STATEMENT

A. *The Official Airline Guide*

Since 1969, the Official Airline Guide ("OAG") has been the sole publication distributed in the United States that compiles passenger flight schedules for domestic air carriers operating between pairs of cities (App. A, *infra*, 2a). Airline ticket offices, travel agents, businesses and members of the public rely on the OAG as the standard reference work for routing

and ticketing passengers. Because it serves as the primary source of flight schedule information, the OAG has been described as "the bible" for that information within the travel industry in this country (App. A, *infra*, 2a). The publisher of the OAG,[1] the Reuben H. Donnelley Corporation, listed information concerning direct and connecting flights of "certificated air carriers" and direct flights of "commuter air carriers."[2] The publisher refused, however, to list the

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[1] The Commission instituted this proceeding against the Reuben H. Donnelley Corporation (a wholly owned subsidiary of Dun & Bradstreet Companies, Inc.), which then published the OAG. Effective January 1, 1979, Official Airline Guides, Inc. (also a wholly owned subsidiary of Dun & Bradstreet Companies, Inc.) assumed responsibility for the publication of the OAG. Consistent with references in prior opinions in this case, we refer to the publisher as "Donnelley" and the publication as the "OAG."

[2] "Certificated air carriers" operate pursuant to certificates of convenience and necessity issued by the Civil Aeronautics Board. "Certificated carriers are authorized to fly large jet aircraft, and pursuant to route authority given them by the CAB, they provide service between the major cities of the nation, as well as between some smaller cities. Generally speaking, the large, well-known airlines in this country—such as American, TWA, etc.—are certificated carriers" (App. C, *infra*, 23a).

"Commuter air carriers" are carriers that do not hold a certificate of public convenience and necessity from the Civil Aeronautics Board, but which fly passengers on at least five round trips per week between two or more points and publish flight schedules (App. D, *infra*, 91a). "Many of the routes they fly are between two smaller, outlying communities, or between a smaller community and a major city. Commuter carriers typically provide scheduled service between cities which are relatively close, with the average route being only seventy-five miles. The main reason for this is that CAB regulations require commuter carriers to use aircraft which are much smaller than those typically used by certificated carriers" (App. C, *infra*, 23a).

connecting flights of commuter air carriers (App. A, *infra*, 3a).[3]

If a carrier's connecting flight schedule is not listed in the OAG, airline booking agents, travelers, and other users of the reference work are generally unaware of such flights and therefore do not use them (App. A, *infra*, 3a, 8a).[4] Because Donnelley refused to carry information concerning commuter connecting flights, commuter carriers were severely handicapped in competing with certificated carriers in markets that were served by carriers from each class (*id.* at 7a–8a).

Competition between commuter carriers and certificated carriers is substantial. As of April 1975, 432 pairs of cities were served by direct flights of commuter and certificated carriers operating in competition with each other (App. C, *infra*, 48a). In 82 such city-pairs, commuter carriers served almost 1 million passengers in 1973 and 900,000 passengers in 1974, while certificated carriers served about 4 million

[3] A "connecting flight" is a flight that requires a traveler to change aircraft at an intermediate point between origin and destination. A "direct flight" involves no such interruption in carriage.

[4] The absence of this information can have significant consequences for air travelers. For example, there are no direct flights between Los Angeles, California and New London, Connecticut (R. 177–178). Under Donnelley's restrictive publication policy, the OAG listed only connecting flights offered by certificated carriers. A user of the OAG would therefore be routed to New London from Los Angeles by way of Philadelphia because all three cities are served by certificated carriers (*ibid.*). If the OAG disclosed connecting flights of commuter carriers, however, the air traveler would also be able to make use of connecting flights from New York, Hartford or Boston. Under Donnelley's publishing policy, this information about commuter connections could be derived only by "constructing a connection" through reference to several portions of the OAG, a difficult and time-consuming task (see R. 260; App. A, *infra*, 3a). ("R." refers to the Joint Appendix filed in the court of appeals).

passengers in those markets in each year (App. A, *infra*, 7a). A report prepared by the Civil Aeronautics Board found that, in fiscal 1973, there were more than 24 markets "in which commuters generated 10,000 or more passengers * * * in competition with certificated carriers [and 24 markets] in which certificated carriers generated 50,000 or more * * * passengers * * * in competition with commuter carriers" (App. C, *infra*, 48a–49a).

Beginning in 1969, commuter air carriers urged Donnelley to publish the schedules of commuter connecting flights in the OAG (see App. A, *infra*, 3a–4a; App. C, *infra*, 33a). Donnelley refused to publish the commuters' schedules, although its executives recognized that "a disservice is being done" to commuter air carriers (App. C, *infra*, 32a). Donnelley also recognized that "[c]ommuter carriers have a great need for connecting flight information since * * * 70 per cent of their passengers are either delivered to or accepted from Certificated airlines" (R. 451). Donnelley also was aware that exclusion of the connecting flight schedules of commuter carriers from the OAG would present a "critical problem" for those carriers (R. 456; see also R. 455, 630). Although Donnelley could have published the information in 1971–1972 at a cost of $6,000 by separately listing the commuters' schedules in the OAG, it nonetheless refused to do so (App. A, *infra*, 8a).[5]

B. *The Decision of the FTC*

In 1976 the Federal Trade Commission charged that Donnelley's restrictive publishing practices violated

[5] Donnelley's publishing policy has always been that some connecting flights will be listed in the OAG free, depending on their convenience and frequency. All other connecting flight listings must be paid for by the carriers involved. Some carriers have paid Donnelley as much as $300,000 per year to carry information about their connecting flights (App. C, *infra*, 31a).

Section 5 of the Federal Trade Comission Act (FTC Act), 15 U.S.C. 45. The two-count administrative complaint alleged that Donnelley participated in a conspiracy with the certificated air carriers to exclude information about connecting flight schedules of commuter carriers, and that Donnelley abused its position as a monopolist by discriminating arbitrarily against the commuter air carriers and causing them competitive injury (App. C, *infra*, 22a, 24a). The administrative law judge found a violation on each count of the complaint (App. C, *infra*, 24a). On Donnelley's petition for review, however, the Commission held that the evidence was insufficient to establish a conspiracy between Donnelley and the certificated air carriers, and dismissed that count of the complaint. The Commission upheld the administrative law judge's finding that Donnelley had abused its monopoly position in violation of Section 5 of the Act.

The Commission concluded that Donnelley's refusal to publish the connecting flight schedules of commuter carriers, while publishing those of certificated carriers that competed with them, was an "unfair method of competition." In reaching that conclusion, the Commission made four central findings: (1) that the OAG occupies a separate product market in which Donnelley enjoys a monopoly position (App. C, *infra*, 46a); (2) that commuter carriers and certificated carriers are directly and substantially in competition with each other (*id.* at 48a–49a); (3) that Donnelley's refusal to publish commuter connecting flight schedules in the OAG was arbitrary and had no reasonable business justification (*id.* at 77a); and (4) that Donnelley's refusal caused serious competitive injury in the national air carriage market (*ibid.*).[6]

[6] The Commission concluded that it had jurisdiction over the publisher in this case even though Section 5(a)(2) of the Act, 15 U.S.C. 45(a)(2), provides that "air carriers * * * subject to the

The Commission characterized the issue before it as "whether Donnelley, as a monopolist, had some duty under the FTC Act not to discriminate unjustifiably between the competing classes of carriers so as to place one class at a significant competitive disadvantage" (App. C, *infra*, 64a). The Commission recognized that it was not dealing with a traditional case of monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. 2, because the monopolist in this case did not benefit from the breakdown in competition that it caused. It harmed competition only in the adjacent air carriage market in which it did not compete. The Commission nonetheless concluded, in reliance on Commissioner Elman's concurrence, and the Court of Appeals' opinion, in *Grand Caillou Packing Co.*, 65 F.T.C. 799 (1964), aff'd, *sub nom. La Peyre* v. *FTC*, 366 F.2d 117, 120–121 (5th Cir. 1966), that a monopolist has a duty under Section 5 of the FTC Act, 15 U.S.C. 45, not to discriminate arbitrarily and unjustifiably in its dealing with competing companies that it serves. The Commission found support for applying Section 5 to such conduct in the antitrust policy "that 'scarce resources' be made available, on a nondiscriminatory basis" when the disfavored competitor has no reasonable alternative means of escaping the competitive disadvantage imposed by the monopolist (App. C, *infra*, 72a–73a).

The Commission also recognized that, by restraining arbitrary monopoly behavior that inflicts substantial competitive injury in adjacent markets, its ruling "may be inconsistent to some extent" with the philosophy expressed in *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919) (App. C, *infra*, 73a n.37). That case established that, under Section 1 of the Sherman Act, 15 U.S.C. 1, there is no illegal combination or conspiracy

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Federal Aviation Act of 1958" are not covered by the FTC Act. App. C, *infra*, 50a–51a.

in restraint of trade when an individual company declines unilaterally to do business with another company. The Commission concluded, however, that the freedom to trade recognized in *Colgate* is circumscribed by the requirements of Section 5 of the FTC Act, which prevents a monopolist from arbitrarily withholding a scarce resource if that conduct causes substantial harm to competition. The Commission limited the scope of its decision by emphasizing that it did not seek to involve itself or the courts in monitoring pricing decisions or in supervising business discretion. To the contrary, it sought only to remedy a monopolist's arbitrary conduct, unsupported by any business justification, that inflicted a significant injury on the competitive viability of a class of business firms that had no alternative means of obtaining the resource in question (App. C, *infra*, 72a–73a).

The Commission's order required Donnelley to cease and desist from refusing to publish connecting flight listings for commuter air carriers. The order directed Donnelley to publish that information pursuant to its own standards governing publication of connecting flight listings for other air carriers. The order further required Donnelley to cease and desist from otherwise arbitrarily discriminating against any air carrier or class of carriers in the publication of connecting flight information (App. C, *infra*, 20a).[7]

[7] Having found a violation of the Act, the Commission concluded that it should enter a cease and desist order notwithstanding Donnelley's post-complaint publication, since 1976, of connecting flight information for commuter carriers. In reliance on *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 48 (1960), the Commission reasoned that discontinuance of an illegal practice, following the filing of an administrative complaint, does not eliminate the need for an order to protect the public. It also held that, since this case involves commercial publishing practices that caused significant harm to competition, the First Amendment does not bar an order necessary to remedy the violation. See App. C, *infra*, 77a–78a n.42, 80a–82a.

C. *The Decision of the Court of Appeals*

On appeal from the Commission's decision, the court of appeals sustained the Commission's underlying factual findings. The court held that there was substantial evidence to support the Commission's determination that certificated and commuter air carriers are significant competitors, that competition was substantially harmed by Donnelley's refusal to publish connecting flight schedules of commuter air carriers, and that Donnelley's refusal to publish those schedules was arbitrary and without reasonable business justification (App. A, *infra*, 2a, 7a–9a).[8] Nonetheless, the court of appeals set aside the Commission's cease and desist order, rejecting the Commission's holding that "Donnelley as a monopolist had [a] duty under section 5 of the FTC Act not to discriminate unjustifiably between the competing classes of carriers so as to place one class at a significant competitive disadvantage" (App. A, *infra*, 10a).

The court of appeals believed that *United States* v. *Colgate & Co.*, *supra*, supplies the controlling precedent in this situation. Under *Colgate*, the court reasoned, a monopolist enjoys unfettered discretion to select the parties with whom it will deal so long as it acts without a purpose to restrain competition, without a purpose to enhance its own monopoly, and with-

[8] The court of appeals also held that the Commission had not abused its discretion by issuing a cease-and desist order despite the OAG's inclusion after 1976 of information concerning commuter connecting flight schedules. The court stated: "quite plainly the mere cessation of illegal activity—even coupled with a promise to obey the law in the future—will not defeat the entry of a cease and desist order" (App. A, *infra*, 16a). The court likewise agreed with the Commission that it had jurisdiction of this case because Donnelley is a publisher, not an air carrier subject to a statutory exemption under the FTC Act (*id.* at 6a).

out behaving coercively. The court relied on *Colgate*, rather than subsequent antitrust decisions holding that there are limits to a monopolist's right to restrain competition in adjacent markets in which it operates.[9] The court reasoned that even though Donnelley may be a monopolist in the airline schedule publishing business, it "had no anticompetitive motive or intent with respect to the airline industry and is engaged in a different line of commerce from that of the air carriers" (App. A, *infra*, 11a). The court also found inapposite those antitrust precedents in which joint owners of a scarce resource have been required to make that resource available to potential users on a nondiscriminatory basis.[10] Those cases, the court observed, involved joint refusals to deal, which differ from the unilateral refusal in this case. Finally, the court distinguished *Grand Caillou Packing Co.*, *supra*, on the ground that the Commission's majority opinion had found that the monopolist there involved was itself a competitor in the market in which discrimination occurred (App. A, *infra*, 13a).

The court acknowledged that "the arbitrary refusal of a monopolist to deal leaves the disadvantaged competitor, even though in another field, with no recourse to overcome the disadvantage * * *." It declined, however, "to take the 'small step' in terms of 'the fundamental goals of antitrust'" that was needed to sustain the Commission's order under Section 5 of the FTC Act (App. A, *infra*, 14a), at least in the absence of "enlightenment from above" (*id.* at 15a). The court

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[9] See, *e.g.*, *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973).

[10] See, *e.g.*, *United States* v. *Associated Press*, 52 F. Supp. 362, 373 (S.D.N.Y. 1943), aff'd, 326 U.S. 1 (1945); *United States* v. *Terminal Railroad Ass'n*, 224 U.S. 383 (1912); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963).

also expressed concern that enforcement of the Commission's order would give the agency "too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry" (App. A, *infra*, 14a).[11]

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the limits of the Federal Trade Commission's authority under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, to declare abuses of monopoly power "unfair methods of competition." The court of appeals agreed with the Commission that Donnelley's refusal to deal denied commuter air carriers access to a unique and competitively indispensable resource, and that the monopolist knowingly caused significant harm to competition between commuter air carriers and certificated air carriers. Despite its recognition that the practice in question caused harm to competition and lacked a commercial justification, the court concluded that *United States* v. *Colgate & Co.*, *supra*, forecloses any remedy under Section 5, "[a]bsent enlightenment from above, or clarification from Congress * * *" (App. A, *infra*, 15a).

This Court should respond to the court of appeals' request for enlightenment. The court of appeals has erroneously construed *Colgate* to limit the Commission's power to protect the public against abuses of monopoly power under its broad statutory mandate to prevent "unfair methods of competition." The Court should reinstate the Commission's decision under Sec-

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[11] In view of its narrow interpretation of the scope of Section 5 of the FTC Act, the court had no occasion to address Donnelley's claim that the First Amendment bars the cease and desist order entered by the Commission. See App. A, *infra*, 2a.

tion 5 of the FTC Act that the fundamental policy of the federal antitrust laws—the protection of competition—requires that a monopolist "take into account the effect on competition" of its intentional discriminatory actions (App. C, *infra*, 76a).

1. *a*. As this Court frequently has emphasized, the fundamental purpose of the federal antitrust laws is to protect competition.[12] Consistent with that overriding purpose, this Court has held that monopoly power may not be used to foreclose competition. See, *e.g.*, *United States* v. *Griffith*, 334 U.S. 100, 107 (1948) ("use of monopoly power, however lawfully acquired, to foreclose competition * * * is unlawful"); see also *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 377 (1973). This principle protects competition both within and outside of the dominated market; there is "no reason to allow the exercise of [monopoly] power to the detriment of competition, in either the controlled market or any other." *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979). See also *Otter Tail Power Co.* v. *United States*, *supra*.

These principles have been distilled in cases in which the monopolist derived some economic advantage from the breakdown in competition that it caused. In this case, as the court of appeals and the Commission both recognized, the anticompetitive consequences described in *Griffith* and its progeny are present, but the abuse of monopoly did not serve the identifiable busi-

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[12] See, *e.g.*, *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 248-249 (1951): "The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, Congress was dealing with competition, which it sought to protect * * *." See also *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690-692 (1978); *Report of the Attorney General's National Committee to Study the Anti-Trust Laws* 1 (1955).

ness interests of the monopolist. The monopolist's conduct was found to be arbitrary, rather than self-serving, and no case arising under Section 2 of the Sherman Act has addressed that situation.[13]

This does not suggest, however, that the Commission is powerless to protect the public against an abuse of monopoly power by issuing a cease and desist order under Section 5 of the FTC Act. To the contrary, the Fifth Circuit has squarely rejected the contention "that a monopolist's behavior having inevitable anticompetitive or other undesirable economic effects solely in an adjacent market [where the monopolist does not compete] can never violate any of the antitrust statutes. *** Thus, under Section 5 of the FTC Act, a monopolist may be required to use uniform and reasonable criteria when dealing with those who compete in an adjacent market." *Fulton* v. *Hecht*, 580 F.2d 1243, 1248–1249 n.2 (1978), citing *LaPeyre* v. *FTC*, 366 F.2d 117 (5th Cir. 1966).

The Fifth Circuit's *LaPeyre* decision, relied on by the Commission in this case (App. C, *infra*, 67a–69a), conflicts with the decision of the Second Circuit here. In *LaPeyre*, the Fifth Circuit interpreted the scope of Section 5 in a monopoly abuse case in a manner that cannot be reconciled with the interpretation of the court below (366 F.2d at 120–121):

> Conceptually, then, the problem of this case is not one of Robinson-Patman-type discrimination, but of the duty of a lawful monopolist to conduct its business in such a way as to avoid inflicting competitive injury on a class of customers. * * *
>
> Both the majority and Commissioner Elman found that the central characteristic was the same—the utilization of monopoly power in one

[13] But cf. *Deesen* v. *Professional Golfers' Ass'n*, 358 F.2d 165, 171 (9th Cir.), cert. denied, 385 U.S. 846 (1966); *United States* v. *Terminal Railroad Ass'n*, *supra*, 224 U.S. at 408.

> market resulting in discrimination and curtailment of competition in another. The Commission's approach is consistent with the broad scope of a Section 5 proceeding. The words "unfair practices" and "unfair methods of competition" are not limited to precise practices that can readily be catalogued. They take their meaning from each case and the impact of particular practices on competition and monopoly. Without further belaboring the issue, it suffices to say that there is abundant evidence in the record to support the Commission's conclusion that [the respondent's] leasing procedure is innately discriminatory and anti-competitive in its effect, and that in [the] circumstances of the instant case, the refusal to treat [different categories of competitor-customers] on equal terms has substantially and unjustifiably injured competition in the shrimp canning industry. It is therefore an unfair method of competition forbidden by Section 5.[14]

The analysis of the Fifth Circuit in *LaPeyre* is entirely consistent with this Court's repeated holding that Congress deliberately empowered the Commission to condemn as an "unfair method of competition" conduct that runs counter to the policy of the federal antitrust laws, even though such conduct does not

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[14] The Second Circuit in the instant case attempted to distinguish *LaPeyre* on the ground that the ruling of the Commission majority in that case turned on the fact that the monopolist itself had been a minor competitor in the market in which the anticompetitive discrimination occurred. However, the decision of the Fifth Circuit rests on broader grounds, as the above quotation demonstrates. Moreover, the Fifth Circuit subsequently explained its own decision in *LaPeyre* as holding that the exercise of monopoly power to injure competition in an adjacent market itself violates Section 5. See *Fulton* v. *Hecht*, *supra*, 580 F.2d at 1249 n.2. There is thus every indication that the Fifth Circuit, bound by its decision in *LaPeyre*, would have affirmed the Commission's cease and desist order in this case.

technically violate those statutes.[15] See, *e.g.*, *FTC* v. *Cement Institute*, 333 U.S. 683, 708–709, 721 n.19 (1948) ("individual conduct, or concerted conduct, which falls short of being a Sherman Act violation may as a matter of law constitute an 'unfair method of competition' prohibited by the [Federal] Trade Commission Act"); *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394 (1953) ("the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act"); *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 369 (1965) ("there are many unfair methods of competition that do not assume the proportions of antitrust violations"); see also *Grand Union Co.* v. *FTC*, 300 F.2d 92 (2d Cir. 1962).[16] Thus, if a significant injury to competition results from an abuse of monopoly power, a statute designed to "supplement" and "bolster" the antitrust laws should not be rendered ineffective solely because the monopolist does not compete in the market in which it harms competition. Arbitrary discrimination by a monopolist, which injures competition, itself is an unfair method of competition. See L. Sullivan, *Antitrust* § 48 (1977).

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[15] Since the present proceeding was instituted solely under Section 5 of the FTC Act, the Commission had no occasion to decide whether Donnelley's conduct amounted to a violation of Section 2 of the Sherman Act. See App. C, *infra*, 74a n.39. The remedy available to the Commission under Section 5, of course, is the prospective remedy of a cease and desist order, not money damages.

[16] The issue considered by the Court in *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239–245 (1972), differs from the issue presented in this case. In *Sperry*, the Court considered practices which, for purposes of its decision, were viewed as not violating either the letter or spirit of the antitrust laws. In this case, by contrast, Donnelley's abuse of monopoly power undermined competitive conditions—conditions which the antitrust laws were unquestionably designed to protect.

b. The Commission quite properly derived additional support for its holding from antitrust cases involving combinations that cause competitive injury through joint refusals to deal. See, *e.g.*, *United States* v. *Terminal Railroad Ass'n*, 224 U.S. 383 (1912); *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). Those cases, arising under Section 1 of the Sherman Act, recognize the serious harm to competition that can result from arbitrary and discriminatory withholding of a scarce resource. The court of appeals disregarded these cases because they involved joint refusals to deal, rather than a unilateral refusal by a monopolist. But in applying Section 5 of the FTC Act to halt a unilateral practice of a monopolist having an identical economic impact, the Commission may properly draw upon the policies expressed in the Sherman Act's prohibition of joint refusals to deal. After all, it has long been established that the "existence of a combination" is not an "indispensable ingredient" of an unfair method of competition under the broad prohibition of Section 5 of the FTC Act. *FTC* v. *Cement Institute*, *supra*, 333 U.S. at 721 n.19. The Commission was therefore correct in observing (App. C, *infra*, 72a) that "if a duty not to discriminate unreasonably can be imposed on a joint venture conferring significant competitive advantages on its competitor-members, it is a small step to impose a duty not to be arbitrary on a monopolist who controls a scarce resource which cannot be duplicated by the joint efforts of companies seeking to use it."

c. Donnelley's discriminatory actions in this case clearly contravened the policy of the antitrust laws to protect competition from abuses of monopoly power. As previously noted, competition between commuter and certificated carriers is substantial. That competi-

tion was seriously impaired by Donnelley's discriminatory practices.[17] The discrimination was also deliberate, since Donnelley persisted in it with full knowledge of the competitive injury it was inflicting on commuter carriers. Finally, Donnelley's discriminatory conduct was wholly unjustified. Donnelley offered no explanation to the Commission for its refusal to list commuter connecting flights, and the evidence showed that the listing could have been accomplished without significant cost or inconvenience to the company. See App. A, *infra*, 8a–9a. There was no indication that commuter airlines were unwilling to pay Donnelley's ordinary charges for listing connecting flights.[18] In these circumstances, the Commission properly concluded that Donnelley's restrictive publishing practices had "a strong potential for stifling competition" and could be corrected by a cease and desist order with little "risk of interfering with legitimate business operations." *FTC* v. *Texaco Inc.*, 393 U.S. 223, 225–226 (1968).[19]

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[17] After Donnelley abandoned its restrictive publishing policy in response to the Commission's investigation and complaint, the commuter carriers experienced a dramatic increase in business. See R. 174–175, 195–196, 241; see also App. A, *infra*, 8a. Prior to the publication of these commuter schedules, many travel agents were unaware that convenient commuter connections were available (R. 210, 244–245, 383). The commuters lost business even though they offered better connections than the certificated carriers (R. 266, 272, 260–261, 466).

[18] The Commission's order in this case merely required Donnelley to treat the commuter carriers like their competitors. If Donnelley required competing airlines to pay for publication of a particular kind of connecting flight schedule, it could require commuter airlines to pay an equivalent amount. See note 5, *supra*.

[19] As previously noted, the Commission's finding that Donnelley used an "unfair method of competition" under Section 5 of

2. *a*. Although the court of appeals sustained the Commission's findings respecting competitive harm, it concluded that, because Donnelley was not a participant in the airline business and did not enhance its own economic welfare by discriminating among carriers, it could not have violated Section 5 of the FTC Act. The court's ruling rested in large measure on *United States* v. *Colgate & Co.*, *supra*, 250 U.S. at 307, which recognized that sellers generally may choose the persons with whom they deal:

> The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.

We submit that the court of appeals misconstrued the reach of *Colgate* in this proceeding under Section 5 of the FTC Act.

Colgate recognizes that the Sherman Act seeks to preserve "freedom to trade," and that unilateral refusals to deal are subject to antitrust scrutiny under certain economic conditions. As this Court later observed in *Times-Picayune* v. *United States*, 345 U.S. 594, 625 (1953), *Colgate* expresses only a "general right" that is "neither absolute nor exempt from regulation" (quoting *Lorain Journal Co.* v. *United States*, 342

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the FTC Act, and its entry of a prospective cease and desist order, do not expose the publisher to private claims for damages under Section 4 of the Clayton Act, 15 U.S.C. 15.

U.S. 143, 155 (1951)). *Colgate* did not purport to set forth all of the circumstances under which a company's refusal to deal would be subject to regulation, and did not imply that the Commission lacks power to reach cases of serious monopoly abuse under Section 5 of the FTC Act.

Indeed, the Court in *Colgate* did not have before it any question of monopoly abuse. See *Lorain Journal Co.* v. *United States*, *supra*, 342 U.S. at 154–155. The sole question in *Colgate* was whether a criminal indictment adequately alleged a combination, contract, or conspiracy in restraint of trade in violation of Section 1 of the Sherman Act. The Court concluded that the indictment did not sufficiently allege concerted action in violation of Section 1, since it charged simply that the defendant refused to deal with persons who did not adhere to its listed retail prices. *Colgate*'s analysis of unilateral conduct under Section 1 of the Sherman Act has little relevance here, since Section 5 of the FTC Act reaches "individual conduct" as well as "concerted conduct." *FTC* v. *Cement Institute*, *supra*, 333 U.S. at 708.

b. The court of appeals also rejected the Commission's reasoning because it believed that the Commission's view would extend Section 5 to troublesome cases in which refusals to deal are based on social, political or personal preference. See App. A, *infra*, 14a; see also 3 P. Areeda & D. Turner, *Antitrust Law* § 736 (1978).

The court of appeals' concerns, however, fail to take account of the carefully defined limits of the Commission's decision. The Commission emphasized that its decision reaches only cases that involve significant injury to competition.[20] Moreover, the injured compet-

[20] The legal standard fashioned by the Commission was carefully confined to a consideration of "impact on competitive

itor must be without alternative means of securing the needed resource, or a reasonable alternative. Absent impact on competition, and absent unavoidable injury, the monopolist's refusal to deal would not violate Section 5.[21]

In addition, the Commission's decision specifies that only "arbitrary" refusals to deal will violate the Act. If, for example, the monopolist's refusal to deal reflects legitimate economic interests or has a substantial business justification—*e.g.*, substantial unrecoverable costs resulting from serving disadvantaged competitors—it could not be characterized as arbitrary.[22] Thus, the Commission's decision does not require the monopolist to serve all customers without discrimination in the manner of a public utility. Moreover, the Commission emphasized that the kind of prospective remedy that it imposed in this case—a cease and desist order requiring the monopolist to treat commuter carriers under the same standards applicable to their rivals—would impose no undue burden on the monopolist or on the Commission and enforcing courts.

Like the court of appeals, the Commission recognized that some refusals to deal based on social or

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conditions"—the paramount concern of the federal antitrust laws. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688 (1978).

[21] Thus, the court of appeals' hypothetical case (App. A, *infra*, 15a) in which a local monopoly supermarket refuses to stock a single brand of vegetables misses the point entirely. That is not a case involving significant competitive harm, as required by the Commission's decision.

[22] As the court of appeals recognized, a monopolist may engage in reasonable commercial behavior in its own self-interest (App. A, *infra*, 9a). See *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, *supra*; *In the Matter of E.I. duPont de Nemours & Co.*, FTC Docket No. 9108 (Oct. 20, 1980).

political grounds may present difficult issues, requiring a balancing of interests under the First Amendment (App. C, *infra*, 73a–74a). But the possibility that such issues may someday arise has not prevented the courts from striking down joint refusals to deal. And the bare possibility that such issues may arise provides no basis for narrowly construing Section 5 of the FTC Act in the present case, which does not involve any such question.[23]

3. The Commission's authority to prevent arbitrary monopoly abuse under Section 5 of the FTC Act is important to the preservation of competition in the economy. Because business decisions ordinarily reflect rational economic self-interest, arbitrary refusals to deal that meet the Commission's requirement of substantial competitive injury are not likely to occur with great frequency. But when they do occur, they can cause serious harm to competition and produce adverse effects on the performance of the affected market. This consequence is well illustrated by the facts of the present case, in which a unique, and competitively essential, resource was withheld from commuter air carriers that attempted to compete with larger certificated carriers. Similar instances of monopoly abuse can occur, for example, in connection with the sale or lease of a patented product for which there is no economically effective substitute (see *LaPeyre* v. *FTC*, *supra*), or

[23] Donnelley's refusal to deal was not based on social or political grounds. The First Amendment claim that it advanced before the Commission and the court below was based on the fact that the OAG is a printed medium for the dissemination of commercial information. While such media enjoy limited First Amendment protection (*Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, No. 79-565 (June 20, 1980)), they are subject to antitrust requirements (*National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 697; *Lorain Journal Co.*, v. *United States*, *supra*, 342 U.S. at 155–156).

in connection with the unregulated activities of public utilities and common carriers (compare *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976)). If the narrow interpretation of the court of appeals is permitted to stand, the Commission would be powerless to prevent such abuses under the broad standard of Section 5—a standard that Congress intended to be "flexible" and to be "defined with particularity [in] the myriad of cases from the field of business." *FTC* v. *Motion Picture Advertising Service Co.*, *supra*, 344 U.S. at 394; *FTC* v. *Keppel & Bro.*, 291 U.S. 304, 309-314 & n.2 (1934).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER, 1980

APPENDIX A

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 1217–September Term, 1979

(Argued June 17, 1980 Decided September 18, 1980)

Docket No. 80-4028

OFFICIAL AIRLINE GUIDES, INC., PETITIONER,

v.

FEDERAL TRADE COMMISSION, RESPONDENT.

Before: OAKES AND VAN GRAAFEILAND, *Circuit Judges*, and NICKERSON, *District Judge.**

OAKES, *Circuit Judge*:

This appeal raises the question whether a monopolist publisher of flight schedules not itself an air carrier has some duty under the Federal Trade Commission (FTC) Act not to discriminate unjustifiably between certificated air carriers and commuter airlines so as to place the latter at a significant competitive disadvantage. Petitioner, Official Airline Guides, Inc., which took over publication of the Official Airline Guide from The Reuben H. Donnelley Corp.

*Of the Eastern District of New York, sitting by designation.

(Donnelley) in 1979, challenges an FTC order, *In re The Reuben H. Donnelley Corp.*, [1980] 3 Trade Reg. Rep. (CCH) ¶ 21,650. The order requires Donnelley to publish in the North American edition of its guide, known as the "OAG," connecting flight listings for commuter airlines in the same manner as it publishes connecting flight listings for certificated airlines, and to refrain from arbitrarily discriminating against any air carrier or class of carriers in publishing connecting flight listings. The guide is a semi-monthly publication that provides detailed information on flight schedules and fares in North America. We find the petitioner's three defenses–that (1) the FTC lacks jurisdiction under the Act to regulate petitioner in this case, (2) there is a lack of substantial evidence in the record to support the Commission's findings, and (3) the petitioner's voluntary compliance prior to conclusion of the FTC proceedings prevents a cease and desist order–all to be unavailing. At the same time we find for the petitioner on the merits of the underlying legal question and we do not reach petitioner's First Amendment defense to the order.

Since 1969 the North American edition of the Official Airline Guide (OAG), the "bible" of the industry, has been the only publication distributed in the United States that combines the North American passenger flight schedules of all scheduled domestic air carriers. It is the "primary market tool of . . . virtually every [air] carrier . . . in the United States," and is the standard reference for airline ticket offices, travel agents, businesses, and the public generally, although it has apparently been displaced to some extent by computerized scheduling.

At the time of Commission's complaint was issued in this proceeding, the OAG contained four categories of flight schedules: (1) direct flights of certificated carriers, that is, flights which do not involve a change of

aircraft between two cities; (2) connecting flights of certificated carriers, that is, flights involving the use of one direct flight in conjunction with another to provide transportation between two cities; (3) direct flights of intrastate air carriers; and (4) direct flights of commuter air carriers. Under Donnelley's publication policy a user of the OAG was not readily apprised of connecting flights of commuter air carriers. For example, there are no direct flights between Los Angeles and Rutland, Vermont, and the OAG listed only those connections involving certificated carriers. A user of the OAG, therefore, might be directed to Rutland from Los Angeles by way of Boston, because all three cities are or have been served by direct flights of certificated carriers. A user of the guide, unless he "constructed a connection," would not be informed of commuter connections from intermediate cities, such as New York or Hartford, which may not serve Rutland by direct flights of certificated carriers, even though these cities may be more convenient to the Los Angeles traveler than a flight through Boston. "Constructing a connection" obviously requires looking for direct flights serving points intermediate to the two cities between which the traveler is flying. Because constructing a connection is difficult and time-consuming, it is important to have connecting flights listed in the OAG. Certificated carriers paid Donnelley in 1975 alone hundreds of thousands of dollars in order to have their flights listed.

As a result of OAG's failure to list the connecting flight schedules of commuter airlines, the Commission found that the latter were handicapped in competing with certificated carriers in markets that were served by both, which included some 432 "city pairs" as of April 1975, a "city pair" being two cities between which there is scheduled airline service. Commuter airlines sought as early as 1969 to have Donnelley

publish commuter connections in the OAG. At one time, Donnelley representatives did sit down with the certificated carriers' trade association, the Air Traffic Conference, to discuss the commuter connection problem, but evidently the certificated carriers were not interested in the increase in competition, and the subject was dropped. It may be noted parenthetically that the administrative law judge's finding that there was a conspiracy between the certificated air carriers and Donnelley was overturned by the full Commission.

In 1975 the FTC staff undertook an investigation into Donnelley's publication policies and Donnelley then expressed a willingness to modify its practices without, however, agreeing to do so in a binding or enforceable agreement. On April 13, 1976, the Commission issued its complaint, charging that Donnelley had violated section 5 of the FTC Act,[1] first, by refusing to publish the connecting schedules of commuter air carriers; second, by failing to merge the direct flight schedules of commuter air carriers that it did publish with similar schedules of certificated carriers; and third, by conspiring with others in restraint of trade. The administrative law judge found against

[1] Section 5 of the FTC Act, 15 U.S.C. § 45, provides in pertinent part:

> (a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce.

Donnelley on all counts, but the full Commission reversed him as to the second and third counts, holding that Donnelley had sufficient business justification for not merging into a single listing the schedules of commuter air carriers and certificated carriers, and that the record did not support a finding of any conspiracy. The Commission did, however, affirm the administrative law judge in finding a section 5 violation in Donnelley's arbitrary refusal to publish the connecting flight schedules of commuter air carriers. The Commission's order directed Donnelley to "cease and desist from failing to publish connecting flight listings for commuter air carriers pursuant to whatever guidelines govern the publication of connecting flight listings for certificated carriers" and petitioner filed the pending petition for review, as to which we have jurisdiction under section 5(c) and (d) of the FTC Act, 15 U.S.C. § 45(c)-(d).

I. Jurisdiction of the FTC

Petitioner's first argument is that the Commission lacks jurisdiction over it in this case.[2] Section 5(a)(2) empowers the Commission "to prevent . . . corporations, except . . . air carriers . . . subject to the Federal Aviation Act of 1958,. . . from using unfair methods of competition . . . and unfair or deceptive

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[2] In an earlier case in the Northern District of Illinois, Donnelley prevailed in this argument. *Reuben H. Donnelley Corp. v. FTC*, [1977] 2 Trade Cas. (CCH) ¶ 61,721 (N.D. Ill. 1977). The judgment in that case was later vacated for failure to exhaust administrative remedies, [1977] 2 Trade Cas. (CCH) ¶ 61,783 (N.D. Ill. 1977), and following cross appeals from the vacatur the court of appeals held that venue in the Northern District of Illinois was improper, 580 F.2d 264 (7th Cir. 1978). We therefore do not think that the original district court decision is in any sense authoritative and, as well, we think it was erroneous.

acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2).[3]

Donnelley is not subject to the Federal Aviation Act and, therefore, Donnelley is really arguing that the FTC cannot even regulate non-carrier corporations when the FTC's purpose is to prevent unfair competition in the airline industry. But this argument confuses the broad mandate given to the Commission to enforce section 5 with the narrow exemption from the Commission's jurisdiction that is granted to air carriers subject to CAB jurisdiction. The analogous surface common carrier exemption in the FTC Act, as the Seventh Circuit has held, "is in terms of status as a common carrier subject to the Interstate Commerce Act, not activities subject to regulation under that Act." *FTC v. Miller*, 549 F.2d 452, 455 (7th Cir. 1977). Similarly, here, it is of no significance that the publishing of airline schedules is an activity affecting competition among air carriers subject to the Federal Aviation Act. Since Donnelley is not itself an air carrier, it is not beyond the Commission's jurisdiction. *Cf. Breen Air Freight, Ltd. v. Air Cargo, Inc.*, 470 F.2d 767, 771-72 (2d Cir. 1972) (corporation formed as subsidiary of airlines for purpose of acting as agent for terminal and cartage services was not an "air carrier" within Federal Aviation Act), *cert. denied*, 411 U.S. 932 (1973).

The only case that petitioner really has to go on is *Fruit Growers' Express Inc. v. FTC*, 274 F. 205 (7th Cir. 1921), *cert. dismissed*, 261 U.S. 629 (1923). In that case the Commission had issued a cease and desist order, holding unlawful a contract between the petitioner supplier of equipment and certain common carriers who were exempt from the Commission's jurisdiction. The reviewing court held that the carriers

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[3] See note 1 *supra*.

were necessary parties to any proceeding concerning the contract, and therefore the Commission could not enter any order affecting it because the carriers were all subject to exclusive ICC jurisdiction. But in the present case there is no claim that air carriers are necessary parties. The Commission has specifically found Donnelley's action to be unilateral abuse of its market position and has specifically found that air carriers were not parties to the allegedly illegal acts.

II. Substantial Evidence

Petitioner argues that the Commission did not properly find that Donnelley arbitrarily injured competition among air carriers. However, substantial evidence supports the Commission's findings of significant competition between certificated and commuter carriers, and of injury to that competition, as well as the finding that Donnelley "arbitrarily" refused to publish the connecting flight schedules of commuter carriers.

Petitioner argues that competition between the certificated and commuter carriers is *de minimis* inasmuch as the approximately one million passengers carried by commuters in 1974 constituted but a small fraction of the total of some 190 million carried by certificated carriers. But in eighty-two city pairs commuter carriers served almost a million passengers in 1973 and 900,000 passengers in 1974, while certificated carriers served about four million persons in those markets. Thus tens of millions of dollars of revenues are involved in the carrying of passengers by commuter and certificated carriers in the city pairs in which they compete, and this is clearly not "insignificant or insubstantial." See *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 572 (2d Cir. 1961) ($523,000 in linen supply business not "insignificant or insubstantial"); *see also International Salt Co. v. United States*, U.S. 392, 396 (1947).

Petitioner further claims that the commuter carriers were not injured by its actions and cites the fact that 70% of commuter air traffic in 1971 was comprised of connecting passengers. But this fact merely shows the extent to which commuter carriers depend on connecting traffic and tells us nothing about the number of passengers who never learned of the commuters' unpublished connecting schedules. The Commission's finding that there is little chance that the availability of unpublished connecting flights will be known was properly predicated upon the testimony of industry witnesses, the statements of travel agents and others, and inferences drawn from the Commission's awareness of the OAG's role in the air travel industry and from the reported increases in commuter traffic that did occur after Donnelley began publishing the connecting flight schedules of commuter airlines.

Moreover, Donnelley did not offer the Commission any explanation for its refusal to list commuter connecting flights. While Donnelley now says that it considered the issue to be factually moot, and that its reasons for not publishing the commuter connecting flight schedules prior to 1976 were esentially the same as its reasons for not merging the direct flight schedule listings of commuter and certificated carriers (as to which the Commission, with one dissent, found business justification), neither explanation has merit. There is no mootness defense. *See SCM Corp. v. FTC*, 565 F.2d 807, 812–13 (2d Cir. 1977). And Donnelley's asserted business justification–that commuter airlines are less reliable than certificated airlines–does not explain why it was willing to list direct commuter flights (albeit separately) but not connecting commuter flights. The total expense involved, once Donnelley started listing connecting commuter flights, was $6,000, and the change in policy was made with apparent ease and no

ill effects. Thus, since in Donnelley's own view commuter airlines' schedules were not inherently unreliable, and the cost and effort involved in listing them were not excessive, the Commission could properly find Donnelley's refusal to publish them arbitrary.

Donnelley, however, contends that the Commission itself is arbitrary. Donnelley argues that under the Commission's standard if a monopoly were to act in its own economic self-interest the Commission would seize upon that fact and declare such behavior to be monopolization in violation of section 2 of the Sherman Act, while if it could not show any economic self-interest the Commission would find it to be acting "arbitrarily." But this argument ignores the fact that section 2 of the Sherman Act does not forbid a monopolist from ever acting in its own self-interest. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281-82 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1061 (1980). Petitioner also ignores the Commission's conclusion that "[i]n examining the question of business justifications, the economic self interest of the monopolist would be the major but not the exclusive consideration," and that "[w]here there is little justification for a business policy, the antitrust laws can require that the monopolist take into account the effect on competition of its actions in the line of commerce made up of its customers, suppliers, or others wishing to deal with it." [1980] 3 Trade Reg. Rep. (CCH) ¶ 21,650, at 21,819. We see nothing arbitrary in the Commission's finding that Donnelley's policy of not merging schedules into single classifications was reasonable while its policy of not publishing commuter schedules at all was arbitrary, since withholding a group of schedules from publication in toto and disclosing the information but dividing it into separate listings are two entirely different matters.

III. Legal Duty of a Monopolist *vis-a-vis* its Customers

We turn then to the crucial issue in the case, whether Donnelley as a monopolist had some duty under section 5 of the FTC Act not to discriminate unjustifiably between the competing classes of carriers so as to place one class at a significant competitive disadvantage. In other words, does the FTC Act authorize the Commission to find unlawful the type of challenged activity engaged in by petitioner? The Commission itself recognized that "[t]he question we are presented with is outside the mainstream of law concerning monopolies and monopolization." [1980] 3 Trade Reg. Rep. (CCH) ¶ 21,650, at 21,816.

On the one hand, the petitioner refers us to the principle expressed in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), that

> [i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

The Commission did not find in the present case "any purpose to create or maintain a monopoly," but went on to say that "the philosophy of *Colgate* must give way to a limited extent where the business judgment is exercised by a monopolist in an arbitrary way." The Commission conceded that its result "may be inconsistent to some extent with the theory of the *Colgate* doctrine." [1980] 3 Trade Reg. Rep. (CCH) ¶ 21,650, at 21,818 n.37.

The Commission's brief, however, refers us to two lines of cases with which it claims its decision is consistent. The first line recognizes limitations that may be placed upon a monopolist's rights to affect competi-

tion. Thus in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the Court held that a monopolist newspaper violated section 2 of the Sherman Act by refusing to sell advertising space to merchants who also purchased air advertising time from a local radio station. Though recognizing the general right of a private business to select its customers, the Court held that the exercise of this right for the purpose of monopolization violates the Sherman Act. *Id.* at 155. But *Lorain Journal*, unlike the present case, involved a monopolist seeking to preserve its *own* monopoly. The Commission similarly argues that its position is supported by *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), where the Court held that a monopolist may not abuse its monopoly power in one market to gain an improper advantage or to destroy threatened competition in an adjacent market in which it also operates. *See id.* at 377–79. But as the Commission itself pointed out, the instant case "differs from ordinary monopolization cases where challenged acts or practices were engaged in to benefit the monopolist competitively, either in the market in which the monopoly power existed or in some adjacent market into which the monopolist had extended its operations." [1980] 3 Trade Reg. (CCH) ¶ 21,650, at 21,815. Donnelley, though possibly a monopolist in the airline schedule publishing industry, admittedly had no anticompetitive motive or intent with respect to the airline industry and is engaged in a different line of commerce from that of the air carriers.

The second line of cases relied upon in the Commission's brief recognizes the duty that the joint owners of a scarce resource have to make the resource available to all potential users on nondiscriminatory terms. Thus in *Associated Press v. United States*, 326 U.S. 1, 15–18 (1945), the Court held that the members of a newsgathering cooperative association could not lawfully

enforce a by-law provision that allowed any member to block nonmember competitors from becoming members. So too, in *United States v. Terminal Railroad Association*, 224 U.S. 383, 410–12 (1912), the Court held that an association of railroad companies controlling access to the city's only terminal facilities had to make them available to nonmembers on reasonable, nondiscriminatory terms and in *Silver v. New York Stock Exchange*, 373 U.S. 341, 347–49, 364 (1963), the Court held that the New York Stock Exchange and its members violated section 1 of the Sherman Act when they jointly denied nonmember broker-dealers access to private wire services with certain Exchange members. Each of these cases, however, involved joint refusals to deal resulting in injury to the *defendants'* competitors, while the instant case involves only unilateral behavior by Donnelley which allegedly has affected competition among air carriers, a business in which Donnelley is not engaged.

The closest case that the Commission could cite is *Grand Caillou Packing Co.*, 65 F.T.C. 799 (1964), *aff'd in part, rev'd in part sub nom. LaPeyre v. FTC*, 366 F.2d 117 (5th Cir. 1966). In that case a monopolist manufacturer of shrimp peeling machinery leased the peeling equipment to shrimp canners in the Northwest United States at rental rates substantially higher than those charged to canners on the Gulf Coast, where the manufacturer also ran its own canning operation. The Commission held that this discriminatory pricing policy violated section 5, as the monopolist had improperly attempted to protect its own shrimp canning operations from competition by other canners. *Id.* at 839, 848. Commissioner Elman, concurring, stated that the record did not support a finding of anticompetitive intent, and argued that the monopolist had merely been charging what the traffic would bear in an attempt to maximize profits. *Id.* at 866-67. It was Commissioner

Elman's reasoning that the monopolist nevertheless had violated section 5 by breaching its duty to treat all users of its equipment fairly, *id.* at 868-69, on which the Commission in this case pinned its holding. *See Reuben H. Donnelley Corp.*, [1980] 3 Trade Reg. Rep. (CCH) ¶ 21,650, at 21,816-17.

The Fifth Circuit, in reviewing *LaPeyre*, held that it need not decide whether the record supported the majority's finding of discriminatory intent because it was clear that the conduct violated section 5 by unjustly discriminating between classes of users. 366 F.2d at 120-21. Thus the Commission argues that *LaPeyre* stands for the proposition that a lack of anticompetitive motive or intent will not, under section 5 of the FTC Act, justify a monopolist's arbitrarily injuring competition in an adjacent market. *See also Fulton v. Hecht*, 580 F.2d 1243, 1248 n.2 (5th Cir. 1978) (citing *LaPeyre* for this proposition, but distinguishing it in that case), *cert. denied*, 440 U.S. 981 (1979). Yet the fact remains that the utilization of monopoly power in one market in *LaPeyre* resulted in discrimination and the curtailment of competition in another market in which the monopolist himself was also engaged, and this surely distinguishes *LaPeyre* from the present case. *See generally* 3 P. Areeda & D. Turner, *Antitrust Law* 238-39, 273-76 (1978).

Conceding in effect that there is no case precisely in point, the Commission suggested in oral argument that it was but a "small step" that we would be taking were we to uphold their decision. Of course we are reminded by the line of cases including *FTC v. Cement Institute*, 333 U.S. 683, 692-93, 720 (1948) and *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 367-68 (1965),[4] that "[w]hile

[4] *Atlantic Refining Co. v. FTC*, 381 U.S. 357 (1965) and other "TBA" cases (tires, batteries and accessories) contain some language that the administrative law judge in this case found

the final word is left to the courts, necessarily 'we give great weight to the Commission's conclusion . . .' " as to what is an "unfair method of competition" or "an unfair act or practice" within the meaning of Section 5 of the FTC Act. We note that the FTC with some justification states that the arbitrary refusal of a monopolist to deal leaves the disadvantaged competitor, even though in another field, with no recourse to overcome the disadvantage, and the Commission wants us to take the "small step" in terms of "the fundamental goals of antitrust." *Reuben H. Donnelley Corp.*, [1980] 3 Trade Reg. Rep. (CCH) ¶ 21,650, at 21,818.

But we think enforcement of the FTC's order here would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry. Such a decision would permit the FTC to delve into, as the Commission itself put the extreme case, "social, political, or personal reasons" for a monopolist's refusal to deal. *See id.* Professors Areeda and Turner give examples of a monopolist theater which refuses to admit men with long hair or a monopolist newspaper which refuses to publish advertising from cigarette manufacturers. 3 P. Areeda & D. Turner, *supra*, at 270-71. The Commission says that neither of these examples would trigger antitrust scrutiny because there is no competition among persons who attend movies, and refusing to publish advertisements for all cigarette companies would not place any of them at a disadvantage *vis-a-vis* a com-

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helpful, at least by analogy. They were not, however, cited by the Commission either in its opinion or in its brief before us, presumably because they involve, as Judge Goldberg pointed out in *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 377 n.10 (5th Cir. 1977), elements of coercion, rather than mere refusal to deal.

petitor. *See* [1980] 3 Trade Reg. Rep. (CCH) ¶ 21,650, at 21,818. Nevertheless, the Commission's own example in footnote 38 of its opinion of a monopolist newspaper refusing to take advertisements from a particular cigarette company because of the style of prior advertisements or the political views of its president shows just how far the Commission's opinion could lead us. What we are doing, as the Commission itself recognized, is weighing benefits to competition in the other field against the detrimental effect of allowing the Commission to pass judgment on many business decisions of the monopolist that arguably discriminate among customers in some way. Thus, if the only supermarket in town decides to stock Birdseye vegetables but not Green Giant vegetables, the FTC would be able to require it to stock Green Giant vegetables if it were to find Green Giant competitively disadvantaged.

We do not think that the *Colgate* doctrine is as dead as the Commission would have it. Only recently we said as much in *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 133 (2d Cir.) (en banc), *cert. denied*, 439 U.S. 946 (1978): "[i]t has always been the prerogative of a manufacturer to decide with whom it will deal." And the Supreme Court in *Reeves, Inc. v. Stake*, 48 U.S.L.W. 4746, 4749 (U.S. June 19, 1980), has again referred to " 'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.' *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)." We think that even a monopolist, as long as he has no purpose to restrain competition or to enhance or expand his monopoly, and does not act coercively, retains this right. Absent enlightenment from above, or clarification from Congress, this is our decision on the merits.

IV. Mootness of Case

If the Commission were correct, however, that failure of petitioner to publish commuter airlines connecting flight schedules amounted to an antitrust violation, the fact that petitioner had already begun to publish such information before the conclusion of the proceedings would not make the cease and desist order invalid. In such a situation, as we have held, the Commission has "discretion" to find that an order is warranted because of the possibility of unlawful recurrence of the activity. *SCM Corp. v. FTC (I)*,565 F.2d 807, 812-13 (2d Cir. 1977); *see also SCM Corp. v. FTC (II)*, 612 F.2d 707 (2d Cir. 1980), *petition for cert. filed*, 48 U.S.L.W. 3794 (U.S. Apr. 12, 1980) (No. 79-1599). There is no evidence in our case that the *FTC* imposed any improper burden on the petitioner, which was the reason for the remand in *SCM Corp. v. FTC (I)*, and we see no evidence of an abuse of discretion since quite plainly the mere cessation of illegal activity—even coupled with a promise to obey the law in the future—will not defeat the entry of a cease and desist order. *Fedders Corp. v. FTC*, 529 F.2d 1398, 1403 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976); *see Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1251 (2d Cir.), *cert. denied*, 100 S. Ct. 481 (1979).

As previously stated, we need not reach petitioner's First Amendment claim.

Petition to review granted; Commission order reversed for reasons stated above.

[The foregoing opinion contains all corrections of typographical errors noted in the court of appeals' memorandum to the parties herein.]

APPENDIX B

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of September, one thousand nine hundred and eighty.

80-4028

Present:

Hon. JAMES L. OAKES

Hon. ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judges*

Hon. EUGENE H. NICKERSON *District Judge*

OFFICIAL AIRLINE GUIDES, INC., PETITIONER,

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition to review an order of the Federal Trade Commission.

This cause came to be heard on the record of the Federal Trade Commission and was argued by counsel.

Upon consideration thereof, it is hereby ordered, adjudged and decreed that the petition for review be and it hereby is granted and the order of the Federal Trade Commission reversed in accordance with the

opinion of this court with costs to be taxed against the respondent.

A. DANIEL FUSARO
Clerk

/s/ _____
ARTHUR HELLER
Deputy Clerk

APPENDIX C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET No. 9079

COMMISSIONERS: Michael Pertschuk, Chairman
Paul Rand Dixon
David A. Clanton
Robert Pitofsky
Patricia P. Bailey

In the Matter of

THE REUBEN H. DONNELLEY CORPORATION, a corporation.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent from the Initial Decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to affirm in part and reverse in part the Initial Decision:

IT IS ORDERED that the Initial Decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent inconsistent with the accompanying Opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED that the following Order to Cease and Desist be, and it hereby is entered:

I.

IT IS ORDERED that respondent The Reuben H. Donnelley Corporation, and its parent, subsidiaries, successors and assigns, officers, agents, representatives, employees, and any concern controlled by it (including joint ventures), directly or indirectly through any corporate or other device, in connection with the publication of the Official Airline Guide—North American Edition or any successor publication, shall forthwith cease and desist from failing to publish connecting flight listings for commuter air carriers pursuant to whatever guidelines govern the publication of connecting flight listings for certificated carriers.

II.

IT IS FURTHER ORDERED that respondent The Reuben H. Donnelley Corporation, and its parent, subsidiaries, successors and assigns, officers, agents, representatives, employees, and any concern controlled by it (including joint ventures), directly or indirectly through any corporate or other device, in connection with the publication of the Official Airline Guide—North American Edition or any successor publication, shall forthwith cease and desist from otherwise arbitrarily discriminating against any air carrier or class of air carriers in the publication of connecting flight listings for air carriers providing scheduled passenger air transportation.

III.

IT IS FURTHER ORDERED that respondent The Reuben H. Donnelley Corporation and its successors

and assigns shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations growing out of this Order.

By direction of the Commission.

SEAL

CAROL M. THOMAS
Secretary

ISSUED: JANUARY 10, 1980

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9079

COMMISSIONERS: Michael Pertschuk, Chairman
Paul Rand Dixon
David A. Clanton
Robert Pitofsky
Patricia P. Bailey

In the Matter of
THE REUBEN H. DONNELLEY CORPORATION, a corporation.

OPINION OF THE COMMISSION

By Pitofsky, Commissioner:

I. INTRODUCTION

In April 1976 the Federal Trade Commission issued a complaint charging The Reuben H. Donnelley Corporation ("Donnelley") with violations of § 5 of the FTC Act, 15 U.S.C. § 45. Donnelley, a wholly-owned subsidiary of Dun and Bradstreet Companies, Inc., is engaged, among other things, in publishing and distributing various publications relating to travel and transportation. The practices challenged in the complaint involve a Donnelley publication called the Official Airline Guide-North American Edition (the "OAG"). The OAG combines into one directory the flight schedules and fares of all scheduled air passenger transportation in the United States, Mexico, Canada and the Carribbean. The complaint focuses on the different treatment accorded in the OAG to the

three different classes of United States air carriers furnishing scheduled air passenger transportation.

The three different classes of domestic air carriers are certificated carriers, commuter carriers, and intrastate carriers. Certificated carriers operate pursuant to "certificates of convenience and necessity" issued by the Civil Aeronautics Board (the "CAB"). One consequence of obtaining such a certificate is being subjected to extensive regulation by the CAB, especially with regard to routes and fares. Certificated carriers are authorized to fly large jet aircraft, and pursuant to route authority given them by the CAB, they provide service between the major cities of the nation, as well as between some smaller cities. Generally speaking, the large, well-known airlines in this country—such as American, TWA, etc.—are certificated carriers.

Commuter carriers do not obtain certificates of convenience and necessity from the CAB, and they operate free of most of the regulations applied to certificated carriers. They are not required to apply to the CAB for route authority, which means that they can provide air service between whatever cities they choose. Many of the routes they fly are between two smaller, outlying communities, or between a smaller community and a major city. Commuter carriers typically provide scheduled service between cities which are relatively close, with the average route being only seventy-five miles. The main reason for this is that CAB regulations require commuter carriers to use aircraft which are much smaller than those typically used by certificated carriers.

Like commuter carriers, intra-state carriers do not obtain certificates of convenience and necessity from the CAB. They operate solely within a state and do not engage in interstate air transportation. They are regulated solely by the individual states within which

they operate. There are a handful of intra-state carriers operating in Florida, Texas, California, Illinois and Alaska.

Complaint counsel alleged in the hearings below that certain aspects of the manner in which Donnelley lists or has listed flight schedule information in the OAG favor certificated carriers over non-certificated carriers and result in serious competitive injury to non-certificated carriers. Responding to their arguments, the presiding administrative law judge (the "ALJ") held that the challenged listing practices violate § 5 on two different grounds: (1) Donnelley has maintained them as the result of an illegal agreement between it and certain certificated carriers; and (2) Donnelley is a monopolist in the providing of flight schedule information, and as such it has a duty not to arbitrarily place one class of carriers at a significant disadvantage *vis a vis* a competing class of carriers. This second ground raises a policy issue which has perplexed antitrust *cognoscenti* for decades—whether antitrust liability may attach to practices of a monopolist which are not related to achieving or maintaining its monopoly power, but which are arbitrary and result in competitive injury to customers, suppliers, or others vulnerable to its monopoly power. We reverse the ALJ's holding that Donnelley entered into an illegal agreement, and we reverse in part and affirm in part his holding regarding Donnelley's duty as a monopolist.

II. FACTS

A. *The OAG.*

According to Donnelley, the OAG "[c]ombines the flights of all scheduled airlines in [the] U.S., Mexico, Canada and the Carribbean into one convenient source." CX 113.[1] In fact, it is the only complete list-

[1] Complaint counsel's exhibits have been labeled "CX" and respondent's exhibits "RX".

ing of scheduled flights in North America. As such, the OAG is the main source of flight schedule information for the flying public and a primary marketing tool for air carriers.

The December 15, 1978 issue of the OAG runs to over 1500 pages and contains thousands of flight listings. RX 571. A full annual subscription, which entitles the purchaser to two updated editions per month, was selling in December 1978 for $98.44. In June 1975 the OAG had a total circulation of over 169,000, and in November 1978 the total circulation of the first-of-the-month issue was 208,000. Most of the OAG's circulation goes to air carriers, travel agents, and businesses (which typically use it in connection with work-related travel by employees).

The predecessor publication to the OAG was published at least as early as 1943, under the title "Universal Airline Schedules". Donnelley acquired the OAG from its then-publisher in 1962. From its inception until 1958 the OAG simply reproduced the timetables of each scheduled air carrier which submitted this information for publication. In 1958 the OAG commenced publication of the "Quick Reference Edition", which embraced a new format still in use today—the "to-city" format. In the "to-city" format, all cities *to which* there is scheduled air carrier passenger service are listed in alphabetical order, each representing a destination point. Beneath the listing for each of these cities, all the cities *from which* there is scheduled air carrier passenger service to the destination city are listed in alphabetical order. Under each "from" city are listed all the flights departing there and arriving in the particular "to" city, with information about departure time, arrival time, fare, type of aircraft, name of airline, etc.

From the time it purchased the OAG until after the complaint in this case was filed, Donnelley listed all

the flights under each "from" city in separate groupings reflecting the class of carrier involved—certificated, commuter, or intra-state—and whether the flight was "direct" or "connecting".[2] The greatest number of categories listed under any "from" city was four. The categories and the sequence in which they were listed was as follows:

1. Certificated carrier direct flights (published with no heading).
2. Certificated carrier connecting flights (published under the heading "Connections").
3. Intra-state carrier direct flights (published under the heading "Intra-State").
4. Commuter carrier direct flights (published under the heading "Commuters").[3]

The following examples, excerpted from an old issue of the OAG, should make all this somewhat clearer.

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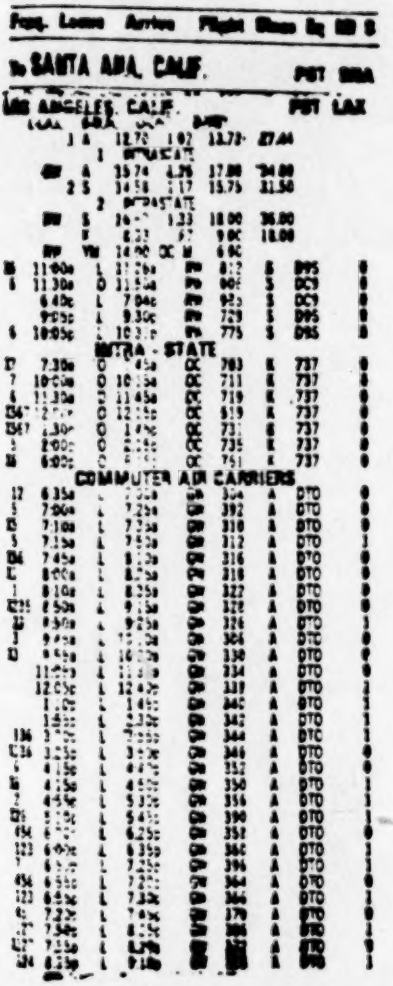
[2] A direct flight is a flight between two cities which does not involve a change of aircraft; a direct flight may be non-stop or there may be one or more stops. A connecting flight is two or more direct flights used in conjunction with each other to provide transportation between two cities; a connecting flight involves changing planes at some intermediate point between the point of origin and the final destination point.

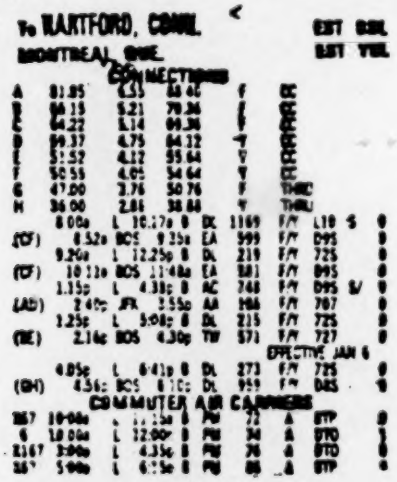
[3] These four categories of air carrier service were always published in the same sequence (or if one or more of the categories was not available between the city-pair involved, in the same sequence minus the category or categories not offered).



A person wishing to fly from Los Angeles, California to Santa Ana, California would turn to Santa Ana in the alphabetical listings of "to" cities, and then look for Los Angeles in the alphabetical listings of "from" cities under the Santa Ana heading. The first nine lines under the bold-faced "Los Angeles, Calif." have to do with fare information and are not flight listings. The next five lines, ending just above the bold-faced "Intra-State", are listings for certificated carrier direct flights; in this case the only certificated carrier flying between this city-pair is Hughes Airwest (denoted by the symbol RW in the fifth column). The

seven lines under the bold-faced "Intra-State" are flight listings for the only intra-state carrier flying between the city-pair: Air California (shown by the symbol OC). Finally, in the lines below the heading "Commuter Air Carriers" are the listings for the flights by the only commuter air carrier flying this route: Golden West (shown by the symbol GW). There are no certificated carrier connecting flights shown here, which means there were no such flights from Los Angeles to Santa Ana at the time this issue of the OAG was published.

The example below, listing flights to Hartford, Connecticut from Montreal, Canada, illustrates how the category of certificated carrier connecting flights fits into this format.



To HARTFORD, CONN. EST GMT
MONTREAL, QUE. EST YUL

CONNECTIONS

A 81.85 6.53 88.38 F
B 66.15 5.21 70.36 J
C 64.22 5.14 69.36 P
D 59.37 4.75 64.12 T
E 51.52 4.12 55.64 V
F 50.55 4.01 54.64 Y
G 47.00 3.76 50.76 F THRU
H 36.00 2.88 38.88 Y THRU

8 00a L 10.17a 0 DC 1169 F/Y L10 S 0
(OF) 8.52a BOS 9.35a EA 999 F/Y 095 0
9.20a L 12.25p 0 DL 219 F/Y 725 0
(OF) 10.12a BOS 11.48a EA 881 F/Y 095 0
1.15p L 4.38p 0 AC 748 F/Y 095 S/ 0
(AD) 2.40p JFK 3.55p AA 986 F/Y 707 0
1.25p L 5.08p 0 DL 215 F/Y 725 0
(DE) 2.14p BOS 4.30p TW 571 F/Y 727 0

EFFECTIVE JAN 6

4.05p L 6.41p 0 DL 273 F/Y 725 0
(DH) 4.56p BOS 7.10p DL 959 F/Y 045 0

COMMUTER AIR CARRIERS

The fact that the first heading is "connections" means there are not certificated carrier direct flights from Montreal to Hartford. Certificated carrier connecting flights are listed under the heading "Connections". The first eight lines under that heading contain fare information. In the lines below those, each two-line pair lists a connecting flight from Montreal to Hartford; all the air carriers involved in those flights are certificated carriers. Commuter carriers' direct

flights are listed separately below, under the heading "Commuters". There would obviously be no intrastate carrier flights between these two cities.

B. *The Alleged Discriminatory Practices.*

Complaint counsel assert that two aspects of Donnelley's listing policy, as illustrated above, have unreasonably restrained competition between certificated carriers and non-certificated carriers. First, they point to the fact that no connecting flights are listed for commuter or intrastate carriers, even though both have such flights; they claim Donnelley's failure to list these flights in the OAG limited users' knowledge that such flights existed and thereby caused commuter and intra-state carriers to suffer competitive injury.[4] Second, complaint counsel claim Donnelley has injured non-certificated carriers by listing the flights of the three classes of carriers in separate groupings in the OAG, with the certificated carriers' first. They argue that listing certificated car-

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[4]Though complaint counsel assert on appeal that Donnelley's failure to list intra-state carriers' connecting flights has injured those carriers (Complaint Counsel's Answering Brief, at 19), Donnelley is correct when it says that the ALJ did not make such a finding (Respondent's Appeal Brief, at 51 n.45). In addition, the complaint makes no mention of intra-state carrier connections, alleging only that Donnelley "has refused to accept for publication any schedules of connecting flights of commuter air carriers" (Paragraph 13), and that the effect of this policy has been "to foreclose commuter air carriers from disseminating information as to available connecting flight schedules to the public" (Paragraph 16). Even though complaint counsel's Proposed Finding of Facts, at 40, do contain an assertion that Donnelley refused to list intra-state carriers' connecting flights in the OAG, there are no citations to the record which establish competitive injury to intra-state carriers. For these reasons, in the discussion that follows we discuss only commuter connecting flights.

riers' flights before the other carriers' flights has led users to believe certificated carriers are preferable to the other two classes of carriers, and to choose the flights of certificated carriers over the flights of commuter and intra-state carriers in situations where they otherwise would not. They also argue that users of the OAG usually read the listings from top to bottom and choose the first convenient flight. Since certificated carriers' flights are listed first, many users pick one of their flights without even looking at the flights of non-certificated carriers.

1. *Failure to list connecting flights of commuter carriers.*

From before the time respondent acquired the OAG until December 1976, the OAG did not list connecting flights involving commuter carriers—that is, commuter flights which connected with either a certificated flight or another commuter flight.[5] With no such information listed in the OAG, the only way a user could discover and purchase a commuter connecting flight was by "constructing a connection". This involves looking up two separate direct flights—one from the point of origin to some intermediate point, and one from that intermediate point to the desired

[5] Donnelley changed the OAG's format in this regard in December 1976, eight months after the complaint in this proceeding issued. The changed format, still used today, lists six separate categories of air service (rather than the original four) in the following sequence: 1) certificated air carrier direct flights; 2) commuter air carrier direct flights; 3) intra-state air carrier direct flights; 4) connecting flights involving only certificated carriers; 5) connecting flights which involve only commuter carriers or both commuter carriers and certificated carriers; and 6) connecting flights which involve only intra-state carriers. *See* the discussion of the effect of that change on this proceeding at page 46 [76a–77a], n.41 *infra*.

destination—and putting them together so as to achieve the desired connection. To construct a connection, a user of the OAG must figure out for himself what cities in between the city of origin and the city of destination would be likely places to catch a connecting flight going to the city of destination. It was established at the hearing that constructing a connection is a difficult and time consuming process. *Initial Decision*, at page 30 [116a], Finding 104. The ALJ found that where the OAG does not list connecting flights between a city-pair, there is little chance that their availability will be known. *Id.* at Finding 106. It follows that if a certificated carrier's connecting flight is listed between a city-pair in the OAG and a commuter carrier's connecting flight is not, the certificated carrier has a significant competitive advantage.

Donnelley's publishing policy has always been that some connecting flights will be listed in the OAG free, depending on their convenience and frequency; all other connecting flight listings must be paid for by the carriers involved. By the amounts they have paid to obtain connecting flight listings in the OAG, certificated carriers have shown that they consider such listings to be an important competitive device. In 1975, Delta paid Donnelley over $160,000 to list connecting flights; TWA over $181,000; Braniff over $115,000; Allegheny over $280,000; Continental over $150,000; Northwest over $216,000; and United over $300,000. Seventy percent of commuter carriers' passengers are connecting to or from certificated carriers. *Id.* at Finding 107. Thus the failure to list connecting flight information for commuter carriers deprived them of a primary marketing tool with respect to a large portion of their business.

This view was confirmed in a petition filed with the CAB by that agency's Office of Consumer Advocate:

> "When such scheduled services [commuters' connecting flights] are not listed in the OAG there is little chance that the availability of such services will be known outside the immediate geographical area. Carrier personnel and travel agents may not be directing the traveling public towards the use of such services simply because they (the carrier personnel and travel agents) are not aware of the existence of the commuters air service. The general public, which to a large extent must rely on such industry professionals in such matters, will not be able to take advantage of commuter services, and air travel to numerous destinations appears to be far less convenient than it may be in fact." CX 28.

The importance of connecting flight listings was also recognized by various Donnelley officials. For example, Donnelley's present Senior Vice-President in charge of the OAG, Mr. Woodward, wrote in 1975 that a "disservice is being done" to commuters by refusing to publish their connecting flight listings. CX 201; *see also* CX 12B; CX 19a.

On appeal, Donnelley has offered no justification at all for this policy. During the hearings, it was established that in 1972 Donnelley had conducted a study on how much it would cost to begin listing separate groupings of commuter carrier connecting flights and intra-state carrier connecting flights. This study revealed that it would cost approximately $6000. RX 16A. The memo recording these findings goes on to say that adding the two additional groupings of flights "would be extremely detrimental" to the OAG. *Id.* But it gives no reason why this should be so. And, indeed, there is no evidence that Donnelley's decision to add the new connecting flight listings in 1976 has been detrimental at all.

2. *Failure to combine the listings of certificated, commuter, and intra-state carriers.*

Since 1969 or thereabouts, commuter and intra-state carriers have urged Donnelley to "merge" the direct flight schedule listings of certificated, commuter, and intra-state carriers into a single chronological listing for each city-pair. *Initial Decision*, at p. 31 [118a], Finding 113. Donnelley has refused to do so.

Complaint counsel claim Donnelley's practice of listing the flights of the three classes of carriers in three separate groupings, with certificated carriers first, gives certificated carriers a significant competitive advantage over the other two. They say this happens, in part, because listing the flights of certificated carriers before the flights of commuter and intra-state carriers suggests to the OAG's users that certificated flights are to be preferred over commuter or intra-state flights. But the main reason why Donnelley's separate listing policy has injured non-certificated carriers, we are told, is that users of the OAG read the flight listings from the top of the page to the bottom and pick the first flight leaving at a convenient time. Thus, since the flights of commuter and intra-state carriers are listed below those of certificated carriers, it is probable that a user will choose a certificated flight before he even gets to the flight listings for commuter and intra-state carriers.

The certificated carriers themselves have long recognized the advantage of having one's flights listed above those of competitors. Donnelley has always listed the flights of certificated carriers in chronological order. But prior to 1972, when different carriers' flights between a particular city-pair had identical departure and arrival times, the flights were listed according to the alphabetical order of the carriers offering them. Thus if an American Airlines flight and a United Airlines flight had identical departure-arrival

times between a city-pair, the American flight would have been listed first. If the two flights had identical departure times but one arrived before the other, the one arriving first got first listing. This policy led to what was known as "jockeying" of flight times: carriers would change the departure time of a flight so as to leave one minute before a competing carrier, or speed up the flight time so as to arrive one minute before.[6] *See Initial Decision*, at p. 33 [120a], Finding 121.

Some certificated carriers became increasingly dissatisfied with this alphabetizing policy and began to call for a policy of randomizing flights with similar departure-arrival times. TWA and United — both of which come toward the tail end of the alphabet — led the fight for this proposed change.[7] Finally, the Airline Guides Committee, which is part of the trade association of certificated carriers and which was in close contact with Donnelley officials regarding the content of the OAG,[8] placed a proposal to change to randomi-

[6] One extreme example of jockeying occurred in 1971 between American and TWA, on flights departing Los Angeles at 9:00 A.M. for Boston. TWA's flight arrived at 5:13 P.M. while American's flight arrived at 5:15 P.M.; so the TWA flight got first listing. In June, American reduced its flight time by two minutes so that it arrived at 5:13 also; this meant American got first listing since flights were listed according to the alphabetical order of the carriers when they had identical departure-arrival times. In August, TWA had reduced its flight time so that it was arriving at 5:08 while American had only gotten down to 5:09; so TWA got first listing again. In September, American had further reduced its flight time so that it was arriving at 5:08 too; the tie went to American.

[7] TWA conducted a study of the matter and compiled a report, which stated: "First listing is a significant advantage. . . ." CX 98I.

[8] Much more will be said regarding this committee in the discussion of the alleged conspiracy, at pages 29–35 [57a–64a], *infra*.

zation on the agenda for its October 1971 meeting. At the meeting, Mr. Parrish (then the Publisher of the OAG) asked for a show of hands of carriers favoring randomization and carriers opposing it. The result was that Donnelley found itself on the horns of a dilemma, as the following notation of one certificated carrier's representative shows:

> "All carriers whose codes began with A-M opposed randomizing and all carriers except one whose codes began with N-Z favored randomizing. Northwest was the exception and this is easily understood since United is their prime competitor." CX 88A.

After considerable tugging and pulling by the A-M camp and the N-Z camp,[9] the OAG changed its policy in 1972 and started randomizing direct flight listings where the flights left at roughly the same time.[10] *Initial Decision*, at p. 33 [119a-120a], Finding 119.

All of this leads us to conclude that listing the flights of certificated carriers in a separate grouping before the flights of commuter and intra-state carriers has

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[9] Both groups suggested the OAG would suffer economic repercussions if they did not get their way. For example, a vice-president of American Airlines said in a letter to Parrish, "[T]he 'paid connection' program which brings in an additional amount of revenue to your corporation may be drastically curtailed or perhaps discontinued by a number of the carriers should this plan [randomization] materialize." CX 118. Meanwhile, an official of United Airlines met with Mr. Reich, who was then Senior Vice-President of Donnelley in charge of the OAG, and gave him a similar message. The United official described it as follows in a memo to his superior: "[Reich said] that TWA is convinced that it is at a disadvantage because of the alphabetical listing. I frankly told Bill [Reich] that we too are unhappy and, as a large customer of Reuben Donnelley, want them to know what our position is." CX 87.

[10] The OAG later randomized connections as well.

put commuter and intra-state carriers at a competitive disadvantage.

3. *Alleged justifications for the separate listing policy.*

Of course, it does not follow that a listing policy which distinguishes between the three types of carriers is arbitrary, or flows from a bad motive. Donnelley vigorously defends its policy of separate groupings, claiming it is justified and even required. Donnelley argues that the policy is based on the fact that each of the three classes of carriers has a different legal status — that is, each is subject to different laws and regulations — and provides a fundamentally different level of service. Separate grouping is therefore necessary, we are told, because Donnelley has a responsibility to make it as clear as possible what kind of air service is being offered.

Complaint counsel deny that the differences in the three classes of carriers are as extreme as Donnelley represents. And they claim that even if there are differences in the three classes of carriers so that it is necessary to put users of the OAG on notice as to what class of carrier they are choosing, the separate listing policy is unacceptable because it is exclusionary; a less restrictive alternative could be chosen — like listing all three classes of carriers' flights together and placing some symbol next to the commuter and intra-state carriers' listings. Complaint counsel also argue that even if one accepts the argument about the three classes of carriers providing different levels of service, Donnelley's separate listing policy does not put users of the OAG on notice as to the type of service they are choosing because Donnelley allows "commuter-type" foreign carriers and some "favored" commuter carriers to be listed with the certificated carriers.

These arguments raise close factual issues about the nature and degree of the differences between the three classes of carriers. They are subject to different statutory provisions and differing degrees of government regulation. Section 401(a) of the Federal Aviation Act of 1958 (the "Act"), 49 U.S.C. § 1371(a), provides that no air carrier shall engage in air transportation unless it has a certificate from the CAB authorizing it to do so. Section 401(d)(1) of the Act, 49 U.S.C. § 1371(d)(1), states that the CAB shall issue the required certificate to the air carrier only:

> "if it finds that the applicant is fit, willing and able to perform such transportation properly, and to conform to the provisions of this Chapter and the rules, regulations, and requirements of the [CAB] hereunder, and that such transportation is required by the public convenience and necessity . . . ."

The air carriers which receive certificates issued under § 401 are certificated carriers. The CAB has adopted extensive regulations regarding how a § 401 certificate may be obtained, as well as how, where, and when the holder of such a certificate shall operate.

Intra-state air carriers have traditionally not been subject to the Act or to CAB regulation. During the period with which the complaint is concerned, to retain its intra-state status — that is, to avoid becoming involved in interstate air transportation — an intra-state carrier could not accept passengers or baggage engaged in an interstate journey, even though it would transport such passengers or baggage wholly within the borders of a single state.[11] Because of this fact,

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[11] Legislative developments occurring since 1977 have radically diminished the differences between certificated air carriers and most intra-state carriers. In November 1977 a new section was added to the Act providing that intra-state air carriers in

intra-state carriers have refused to accept passengers whose tickets showed them to be engaged in an interstate journey. Donnelley claims that these differences make intra-state carriers unique and require that their flights be listed separately.

Section 416(a) of the Act, 49 U.S.C. § 1386(a), permits the CAB to establish classifications of air carriers "as the nature of the services performed shall require"; and § 416(b), 49 U.S.C. § 1386(b), permits the CAB to exempt any air carrier or class of air carriers from the Act or rules or regulations adopted thereunder. Under § 416, the CAB has created by regulation a classification of air carriers called "air taxi operators", of which commuter air carriers are a part. 14 C.F.R. § 298. Briefly, the regulations require that such carriers: (a) operate aircraft having thirty or fewer seats and a maximum "payload" capacity of not more than 7,500 pounds; (b) register with the CAB as an air taxi operator; and (c) maintain certain minimum liability insurance limits. The CAB has exempted commuter air carriers from virtually all the requirements of the Act

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California and Florida could accept passengers and baggage from certificated carriers and that joint fares, rates, and services between such carriers were subject to CAB regulation. Section 401(d)(4), 49 U.S.C. § 1371(d)(4). This provision was broadened to include intra-state carriers in all states by Section 9 of the Airline Deregulation Act of 1978, Publ. L. 95-504, 92 Stat. 1705 (eff. Oct. 24, 1978). In addition, the Airline Deregulation Act amended the Federal Aviation Act to provide that intra-state carriers were entitled to apply to the CAB for certain interstate routes and, if their requests were granted, to become certificated air carriers. Of the seven intra-state airlines in existence in 1977, three have now received grants of interstate routes and become certificated carriers; as a result, all of their flights are now listed as certificated carrier flights. The December 15, 1978 issue of the OAG (RX 571) shows only six intra-state air carriers operating in the United States; their flights are listed separately from those of the other two classes of carriers.

and from the regulations applicable to certificated carriers. Donnelley argues that because certificated carriers are subject to strict regulation while commuters are not, certificated carriers are much more reliable than commuters in providing accurate flight schedule information; are safer than commuters; fly larger aircraft which are generally superior to those flown by commuters; provide amenities not available on many commuter flights; maintain superior airport facilities; and have special consumer protection obligations. These alleged differences will be taken up and discussed in order.

Donnelley has stated that it "is vitally concerned with the accuracy of the information contained [in the OAG] and with the reliability of the air carriers which list their services in the OAG." RX 221. Donnelley claims commuters have caused special problems in this regard because they frequently cease operations without notifying Donnelley.[12] When this happens, they say, listings for the discontinued flights may be published in the OAG for weeks or months before it is discovered that the airline has gone out of business. Complaint counsel point out correctly that several certificated carriers have also gone out of business. In addition, the ALJ found that the largest fifty commuter air carriers carry about 90% of all commuter traffic (*Initial Decision*, at p. 29 [115a], Finding 100), and there is no evidence that any of these carriers have been guilty of ceasing operations without informing Donnelley. Nevertheless, it appears that unannounced

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[12] Donnelly buttresses this assertion with the following facts: (1) as of 1968 approximately 25% to 30% of the "air taxi" industry (of which commuters are a part) turned over each year; (2) from 1970 through 1972 an average of thirty commuter carriers ceased operations each year; and (3) during the period from 1970 until October 17, 1978 the flight schedule listings of 168 commuter carriers had been removed from the OAG.

exit from the field does occur among smaller, newer commuter carriers.

Donnelley argues that commuter carriers have a lower safety level than certificated carriers. Preliminary data for 1977 published by the National Transportation Safety Board reveal that the passenger fatality rate for commuter carriers was 1.48 per 100 million miles flown, while the corresponding passenger fatality rate for certificated carriers was 0.04. RX 563. Complaint counsel argue that these figures are not comparable because measuring safety in terms of fatalities per million miles flown is misleading. They say commuters fly much shorter routes than certificated carriers and consequently have many more takeoffs and landings per million miles flown than do certificated carriers, and it is during takeoff or landing that accidents usually occur. But according to other National Transportation Safety Board statistics which were cited and relied upon in a report by the Committee on Government Operations of the House of Representatives,[13] the accident rate for commuter airlines during 1976 was 1.57 accidents per 100,000 *departures*, while the certificated carriers' accident rate was only 0.44 accidents per 100,000 *departures*. Complaint counsel argue that even accident rates based on number of departures are unreliable measures of the comparative safety of commuter and certificated carriers because commuters frequently fly to remote, outlying areas where certificated carriers are unwilling or unable to fly. These areas may have relatively worse terrain and weather conditions, and smaller, less-safe airports. They argue that to get a truly accurate comparison of the safety records of the two types of carriers, one would have to compile statistics re-

[13] Airline Deregulation and Aviation Safety, H.R. Rept. No. 930, 95th Cong., 2d. Sess. (1978) (hereinafter referred to as "H.R. Rept. on Aviation Safety"). RX 344.

garding the safety records of commuter and certificated carriers for those city-pairs where the two compete. Though we agree that such a study would provide a more accurate statement of the comparative safety of the two, we are persuaded by the statistics cited above and by other evidence[14] that Donnelley had cause to believe that certificated carriers, on the average, are safer than commuter carriers. *Cf. Initial Decision*, at p. 29 [115a], Finding 100.

Generally, certificated carriers fly larger, faster planes than commuters. One reason for this is that CAB regulations limit commuter air carriers to planes which have a capacity of no more than thirty seats and a "maximum payload" of 7500 pounds.[15] 14 C.F.R. § 298. Such planes usually fly at speeds between 200 and 300 miles per hour. *Initial Decision*, at p. 22 [108a], Finding 71. The larger jets typically operated by certificated carriers, on the other hand, carry 100 or more passengers and fly at speeds over 500 miles per hour. *Id.* However, the ALJ found that certificated carriers "sometimes" fly commuter type aircraft. *Id.* at p. 25 [111a], Finding 75.

Certificated carriers' flights frequently offer amenities which are not available on many commuter flights, like on-board meals, lavatories, etc. But the ALJ found that since commuter carriers normally fly short routes averaging only about seventy-five miles, these amenities are not as important to passengers as other factors such as the time schedule of the flight.

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[14] Certificated carriers and commuter carriers are governed in safety matters by different sections of the Federal Aviation Regulations, and the regualtions governing certificated carriers are more stringent. *Initial Decision*, at p. 29 [115a], Finding 99.

[15] The Airline Deregulation Act of 1978, P.L. 95-904, 92 Stat. 1705, increased the size of the aircraft which commuter air carriers may operate to a maximum capacity of fifty-six passengers.

Id. at p. 25 [111a–112a], Finding 77. Certificated carriers often have better ground facilities — like ticket, baggage, and boarding areas — than commuter carriers. *Id.* at p. 26 [112a], Finding 79. In addition, CAB regulations impose on certificated carriers certain consumer protection obligations which commuters do not have; these include denied boarding compensation, baggage liability, and "no smoking" sections.

Granting that some differences do exist, complaint counsel claim Donnelley's argument about all the differences among certificated, commuter, and intra-state carriers is a red herring. They say Donnelley does not really honor the strict legal categorizations which are said to produce these differences. Specifically, complaint counsel say that Donnelley lists the flights of commuter-type foreign air carriers and certain favored commuter carriers with the flights of certificated carriers.

Donnelley does list the flights of foreign air carriers with the flights of certificated carriers.[16] Complaint counsel argue that foreign carriers "fly no larger aircraft, are no safer, are no more reliable and are no more preferred by passengers than are commuter and intrastate carriers." Complaint Counsel's Answering Brief, at 27. The ALJ found that foreign carriers frequently fly small aircraft like the ones flown by commuter airlines, and that they are not subject to safety regulations issued under the Federal Aviation Act. *Initial Decision,* at p. 25 [111a], Finding 73. Donnelley responds that foreign carriers have a legal status very similar to that of domestic certificated carriers. They point to § 402 of the Federal Aviation Act, 49 U.S.C. § 1372, which is more or less parallel to § 401 (gov-

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[16] In fact, the ALJ found that of the 118 carriers now listed in the OAG as certificated carriers, 79 are foreign air carriers. *Id.* at p. 13 [99a], Finding 27.

erning certificated air carriers). Section 402(a) provides that "[n]o foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the CAB authorizing such carrier to so engage."[17] Under § 402(b), the CAB may issue a permit to a foreign carrier only:

> "if it finds that such carrier is fit, willing, and able properly to perform such air transportation and to conform to the provisions of this chapter and the rules, regulations and requirements of the CAB hereunder, and that such transportation will be in the public interest."[18]

Donnelley argues that the fact that a foreign air carrier must obtain a permit from the CAB and subject itself to some CAB regulation means that it is like a domestic certificated carrier rather than like a commuter. Donnelley also claims that except for "a handful" of Carribbean foreign carriers, the foreign carriers listed in the certificated carrier section of the OAG include well-known overseas carriers like Air Canada, Air France, British Airways, etc.

Complaint counsel also point to the fact that the flights of certain commuter "replacement" carriers are listed with the flights of certificated carriers in the OAG. A replacement carrier is a commuter carrier which enters into an agreement with a certificated carrier whereby the commuter provides service in place

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[17] "Foreign air carrier" is defined in § 101(19) of the Act as "any person, not a citizen of the United States, who undertakes . . . to engage in foreign air transportation." 49 USC § 1301(19). Section 101(21) defines "foreign air transportation" as "the carriage by aircraft of persons or property . . . in commerce between . . . a place in the United States and any place outside thereof." 49 U.S.C. § 1301(21).

[18] *Compare* Section 401(d)(1), relating to certificated carriers, at page 13 [37a], *supra*.

of the certificated carrier over some of the certificated carriers routes to smaller cities. Such an arrangement allows the certificated carrier to maintain its route authority to the smaller communities and simultaneously serve those areas at the lower cost associated with operating smaller "commuter" aircraft. The main example of this is the replacement carriers serving Allegheny. These "Allegheny commuters" have had their flights listed with those of the certificated carriers since 1969. They are marked with a symbol in the shape of a square next to the flight number. In the "Abbreviations and Reference Marks" section of the OAG the symbol is defined as follows: "[Symbol] Following Flight Number Indicates A Replacement Flight Operated By A Commuter Air Carrier On Behalf Of A Certificated Carrier Pursuant To A CAB Approved Agreement."[19] Thirty commuter carriers operate replacement flights for certificated carriers Alaska Airlines and Wien Air Alaska, Inc. and receive the same display treatment as Allegheny commuters in the OAG. Altogether about 700 of the 50,000 direct flights listed in a recent issue of the OAG were replacement flights operated by commuters but listed in the certificated section. *Initial Decision*, at p. 15 [101a], Finding 32.

Donnelley argues that listing these commuter replacement carriers with the certificated carriers is not inconsistent with its previously stated policy on separate groupings because the replacement flights are listed with certificated flights only if the replacement arrangement arises pursuant to an agreement approved by the CAB. Donnelley also claims that it enforces strict requirements concerning the operation of

[19] It is complaint counsel's contention that if the listings of all three classes of carriers were combined, a marking like this one would be a sufficient means of putting a user of the OAG on notice that a flight was a commuter or intrastate flight.

the replacement flights, including one that both the commuter replacement carrier and the certificated carrier identify the replacement flight as that of the certificated carrier. In this regard, Donnelley makes much of the fact that Allegheny commuters are flown under Allegheny's logo and colors, and that even their ticket counters and other ground facilities are made to look like Allegheny's. And they also point out that other commuter replacement carriers have been denied listing in the certificated section of the OAG despite the fact that they operate their replacement flights pursuant to a CAB approved contract; the reason given by Donnelley for this in at least one case was that the commuter replacement flights were "operated under the name and in all appearance as a commuter. . . . There is no requirement similar to the Allegheny requirement that the airplanes, ticket counters and other facilities, etc., be made to look like [the certificated carrier being replaced]." CX 131A. It was established at the hearings, however, that at least one Allegheny commuter flight is flown under the commuter airline's colors and logo, rather than Allegheny's. Transcript; at 2572-75. In addition, it appears that the Alaska replacement carriers do not fly under the certificated carriers' colors and logo, but merely place a card or placard announcing the name of the replaced certificated carrier at the ticket counter and on the aircraft. Donnelley has offered no explanation for this inconsistency.

III. DISCUSSION OF LAW

A. *Relevant Market.*

Since one of the theories of violation in this case involves an allegation that Donnelley is a monopolist, we must determine the relevant market within which Donnelley operates. There is agreement between the parties that the relevant geographic market in this

case is the United States. *Initial Decision*, at p. 44 [133a].

Though the parties disagree over the relevant product market, the ALJ found that there are no substitutes for the OAG, and that it therefore comprises a separate product market in the providing of flight information about scheduled passenger air transportation service in the United States. *Id.* at pp. 16–19 [102a–105a], Findings 35–51, and pp. 44–47 [133a–136a]. We believe this finding is correct. The OAG is the only complete listing of scheduled flights in North America; it is the primary source of flight schedule information for the flying public and the primary marketing tool for carriers. *Id.* at p. 16 [102a], Finding 35. It is referred to in the airline industry as the "Bible". Citing *United States* v. *E.I. DuPont de Nemours & Co.*, 351 U.S. 377 (1955), Donnelley argues that the ALJ wrongly excluded several reasonably interchangeable substitutes for the OAG; specifically, Donnelley mentions media advertising, computerized schedule information, and system timetables published by individual air carriers. But a review of the record convinces us that none of these is an effective substitute for the OAG.

Air carriers do sometimes use radio, television, and newspapers to advertise their flights, and in some instances those advertisements contain limited flight schedule information. But when flight information is included in an advertisement, it is only for the flights of the particular carrier purchasing the advertisement and even then it is normally limited to a few city-pairs. *Initial Decision*, at p. 19 [104a–105a], Finding 50. In addition, travel agents and corporate travel departments—a major sub-category of "purchasers", *see United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966)—do not normally use radio, television, or newspaper advertisements to obtain flight information

and book flights. *Initial Decision*, at p. 19 [105a], Finding 51.

Many air carriers rely to some extent on computer tapes upon which airline schedule information has been coded. These are called "SCIP" tapes; SCIP is an acronym for Schedule Change Input Package. When the information on a SCIP tape is called for by the operator of the computer terminal, it is displayed on a cathode ray tube. Using SCIP tapes is much more expensive than using the OAG: the annual cost of a cathode ray tube for an office doing between $2,500,000 to $3,000,000 per year in business would be $15,000 to $16,000, while a year's subscription to the OAG costs $98.44.[20] Consequently, very few travel agencies or corporate travel offices can justify the cost of SCIP tapes. And even those airlines, travel agents, and corporations which have access to SCIP tapes also subscribe to the OAG and use it in conjunction with the SCIP tapes; this is because SCIP tapes normally contain less flight schedule information than does the OAG. Moreover, Donnelley itself is a major supplier of this purported substitute to the OAG, as it supplies SCIP tapes to twenty-five certificated carriers. Transcript, at 4127.

Most air carriers print and distribute their own individual timetables containing flight schedule information. These timetables generally contain flight schedule listings only for the carrier distributing them, and they usually have only local or limited distribution. These timetables are expensive: one witness testified that each timetable cost his company approximately $.50. Transcript, at 840. Airlines, travel agents, and corporate travel offices normally do not use airlines' individual timetables to obtain flight information.

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[20] *Cf. Int'l Boxing Club* v. *United States*, 358 U.S. 242 (1959), where significant price differences were emphasized in carving out a separate product market.

The OAG is recognized in the industry as being unique and indispensable; there are substantial price differences between the OAG and its purported substitutes; and there are distinct users of the OAG for whom no other product will do. For these reasons, we hold that the OAG comprises a separate product market. *See Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962).

B. *Competition Between Certificated and Non-Certificated Carriers.*

The ALJ found that commuter and intra-state carriers compete with certificated carriers. *Initial Decision*, at pp. 22–27 [108a–114a], Findings 67–92. Donnelley asserts that there is only *de minimus* competition between certificated and non-certificated carriers and that the ALJ's finding should be reversed. We believe the ALJ's finding is supported by the record.

In April 1975 there were 432 city-pairs served by direct flights of both commuter and certificated carriers. CX 135E. In the one-year periods ending June 30, 1973 and June 30, 1974, commuter and certificated carriers competed in eighty-two city-pair markets in which passengers totaled 1,000 or more. For the period ending in June 1973 commuters accounted for almost 1,000,000 passengers in those eighty-two markets, while certificated carriers accounted for over 4,000,000 passengers. The passengers flying on commuter air carriers in those eighty-two markets during that period represented 17.5% of all commuter traffic in the contiguous forty-eight states for the period. For the period ending in June 1974 commuter carriers had almost 900,000 passengers in the eighty-two markets, and certificated carriers had over 4,000,000. The 900,000 commuter passengers represented 19.6% of all commuter traffic in the forty-eight states for that period. A report prepared by the CAB entitled "Com-

muter Carrier-Certificated Carrier Competition" states that there were "twenty-four markets in which commuters generated 10,000 or more passengers in [fiscal year] 1973 *in competition* with certificated carriers . . ." and "24 markets in which certificated carriers generated 50,000 or more . . . passengers in [fiscal year] 1973 *in competition* with commuter carriers . . ." CX 61 (emphasis added.) The report went on to say that "[c]ommuter market shares ranged from 0.49% to 35.31%."[21]

Donnelley argues that competition is *de minimus* because the total number of passengers carried by commuter carriers in the period ending in June 1974 comprised less than one-half of 1% of the 190,000,000 passengers carried by certificated air carriers in scheduled domestic passenger service in 1974. But the same argument advanced by Donnelley here was rejected by the Second Circuit in *United States* v. *Consolidated Laundries*, 291 F.2d 563 (2d Cir. 1961). In that case linen suppliers were charged with violating § 1 of the Sherman Act by allocating out-of-state customers. The court stated:

> "Appellants seemingly rely on a *de minimus* exception; they argue that interstate customers' service amounts to only 1% of all service. But (even accepting appellants' figures) such 1% amounted in 1954 to $523,168 worth of business, a 'volume of business. . . [which] cannot be said to be insignificant or insubstantial.' That this substantial amount of interstate commerce amounted to only 1% of the total industry's volume is without significance." *Id.* at 573 (citations omitted).

See also International Salt Co. v. *United States*, 332 U.S. 392 (1947). If $500,000 is more than *de minimus*

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[21] A CAB report by the same name prepared for the year ending June 30, 1974 had similar findings.

competition, then *a fortiori* the tens of millions of dollars of revenues involved in the carrying of passengers by commuter and certificated carriers in the city-pairs in which they compete is not *de minimus*.

The ALJ also found that there has been substantial competition between certificated and intra-state carriers. *See Initial Decision*, at p. 28 [114a–115a], Findings 93–97. We concur in this finding. Certificated and intra-state carriers often serve the same city-pairs. Southwest Airlines, an intra-state carrier, competes in all twenty-five of its city pairs with certificated carriers. Air Florida and Air California, two other intra-state carriers, also compete with certificated carriers in various city-pairs. In addition, both an expert witness called by Donnelley and Donnelley's own Publication Manager testified that intra-state carriers compete with certificated carriers. Transcript, at 3326–29, 3394.

C. *Jurisdiction*.

Donnelley has urged strongly throughout this proceeding that the FTC lacks jurisdiction over the "subject matter" of the complaint.[22] Upon review we con-

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[22] Early in the proceeding, Donnelley moved to dismiss the complaint on the grounds of lack of jurisdiction. The ALJ denied this motion and refused to certify the question to the Commission; and the Commission denied Donnelley's extra-ordinary appeal. Respondent thereupon sought injunctive relief in the United States District Court for the Northern District of Illinois. That court held that the FTC lacked jurisdiction and enjoined the Commission from further proceedings. *The Reuben H. Donnelley Corp.* v. *FTC*, [1977–2] Trade Cas. (CCH) ¶61,721 (N.D. Ill. 1977). Shortly thereafter the same court vacated its order on the grounds that Donnelley had failed to exhaust its administrative remedies. *The Reuben H. Donnelley Corp.* v. *FTC*, [1977–2] Trade Cas. (CCH) ¶61,783 (N.D. Ill. 1977). Both sides appealed and the Court of Appeals for the Seventh Circuit

clude that the FTC does have jurisdiction in this proceeding.

Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1), bans unfair methods of competition and unfair or deceptive acts or practices. Section 5(a)(2), 15 U.S.C. § 45(a)(2), states that the FTC is empowered to enforce this ban against persons, partnerships, or corporations, "except banks, common carriers subject to the Acts to regulate commerce, *air carriers, and foreign air carriers subject to the Federal Aviation Act of 1958*, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act. . . ." (Emphasis added.) On its face, this section appears to answer the question of whether the FTC has jurisdiction over Donnelley and its acts, practices, and methods of competition. Donnelley is not an air carrier or a foreign air carrier, and therefore the Commission apparently has jurisdiction. But Donnelley argues that the issue is not that simple. The key language of Section 5(a)(2) does not just exclude air carriers from *in personam* jurisdiction, Donnelley contends; rather, it excludes the whole subject of competition among air carriers from the FTC's "subject matter" jurisdiction. And this means that the FTC has no jurisdiction over this proceeding, because it "is limited exclusively to competition among air carriers." Respondent's Appeal Brief, at 8.

Donnelley relies entirely on the 1921 case of *Fruit Growers' Express Inc.* v. *FTC*, 274 F. 205 (7th Cir. 1921), *cert. dismissed*, 261 U.S. 629 (1923). In that case the FTC struck down an exclusive dealing clause

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held that venue was improper in the Northern District of Illinois. *The Reuben H. Donnelley Corp.* v. *FTC*, 580 F.2d 264 (7th Cir. 1978). The case was then transferred to the United States District Court for the District of Columbia, where the court dismissed Donnelley's complaint for failure to exhaust administrative remedies.

in a contract between Fruit Growers Express (which was not a common carrier) and certain railroads, claiming that it violated § 3 of the Clayton Act, 15 U.S.C. § 14. On appeal, the court noted that under § 11 of the Clayton Act, 15 U.S.C. § 21, jurisdiction to enforce § 3 is divided among the FTC and certain other agencies. In relevant part, § 11 states that jurisdiction is "vested in the Interstate Commerce Commission *where applicable to common carriers subject to the Interstate Commerce Act*, . . . and in the Federal Trade Commission where applicable to all other character of commerce . . . ." (Emphasis added.) Turning to the challenged exclusive dealing clause, the court noted that striking it from the contract would remove the railroads' only obligation to provide consideration, thus destroying the mutuality of the contract and rendering it unenforceable. This led the court to observe: "Such being the effect of the [FTC's] finding and order, the carriers were necessary parties." 274 F. at 207. The court continued:

> "The words 'where applicable to common carriers' in section 11 of the Clayton Act must mean that where the facts involve common carriers, or the business of common carriers, then the jurisdiction is solely in the Interstate Commerce Commission. The action complained of involved common carriers and tended to very greatly affect their business. Respondent was therefore without jurisdiction." *Id.*

The court's holding turns on its finding that the carriers were necessary parties to an action which would impair their contractual rights, and on the fact that the "where applicable to common carriers" language of § 11 is ambiguous and suggests subject matter jurisdiction.

The jurisdictional question on appeal before us now is different. Jurisdiction to enforce the FTC Act is

vested solely in the FTC, but language in § 5(a)(2)—"except air carriers and foreign air carriers"—operates *in personam* to exempt a very narrow class of businesses from the FTC's jurisdiction. A case more closely analogous to this case is *FTC* v. *Miller*, 549 F.2d 452 (7th Cir. 1977), involving an investigation of Morgan Drive Away, Inc., a common carrier subject to the Interstate Commerce Act. The FTC had adopted a resolution authorizing the use of compulsory process to determine whether Morgan had violated § 5 of the FTC Act —"including false or misleading advertising or misrepresentation in connection with the solicitation of persons to become owner-operators in the nationwide mobile-home transporting industry." 549 F.2d at 454. Morgan asserted that the FTC lacked jurisdiction to investigate it because it was a common carrier, pointing to § 6(a) of the FTC Act, 15 U.S.C. § 46(a), which states that the FTC shall have the power to investigate persons, partnerships, or corporations "excepting banks *and common carriers subject to the Act to regulate commerce* . . ."[23] (Emphasis added.) The FTC argued that this language did not deprive it of jurisdiction over Morgan because the investigation focused on Morgan's promotional activities, which were not subject to regulation under the Interstate Commerce Act. That is, the FTC argued that the jurisdictional exemption created in § 6 did not operate *in personam* to exclude common carriers from FTC jurisdiction altogether, but rather only operated to exclude the FTC from "subject matter" jurisdiction over "activities" which were subject to regulation

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[23] This Section 6 language ("excepting . . . common carriers") is almost identical to the § 5 language quoted above ("except common carriers") and to the Section 5 language about air carriers ("except . . . air carriers"). But all of this language from § 5 and § 6 is different from the language of § 11 of the Clayton Act—"where applicable to common carriers".

under the Interstate Commerce Act. The Court of Appeals rejected this argument, saying: "The exemption is in terms of status as a common carrier subject to the Interstate Commerce Act, not activities subject to regulation under that Act."[24] 549 F.2d at 455.

The court's language is equally applicable to the jurisdictional exemption in § 5 for "air carriers and foreign air carriers subject to the Federal Aviation Act": the exemption is in terms of status as an air carrier subject to the Federal Aviation Act, not activities subject to regulation under that Act.

In the injunction action regarding this proceeding in the Northern District of Illinois (*see* page 24 [50a–51a] n.22, *supra*), the court held that "the phrase 'prevent corporations . . . except air carriers. . . from using unfair methods of competition' should be read to mean 'exercise jurisdiction over unfair methods of competition, except among air carriers.' "[25] [1977–2] Trade Cas. (CCH), at p. 72,943. The court relied entirely on *Fruit Growers' Express* and did not even mention *Miller* except for a citation on a side issue. *Id.* at p. 72,944. This total reliance on *Fruit Growers' Express* prompted the court to "redraft" § 5(a)(2) of the FTC Act so as to make it identical to § 11 of the Clayton Act, thereby making *Fruit Growers' Express* the con-

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[24] The court did state elsewhere: "We need not decide whether the FTC is correct in its statement that the non-carrier activities of a common carrier do not fall within the scope of the § 6 exemption." 549 F.2d at 458. Thus, the court saved for another day the question of whether a company which engages in activities as a common carrier and in activities which are unrelated to being a common carrier would be entirely exempt from the FTC's jurisdiction, or whether its non-carrier activities might be reached by the FTC.

[25] As we noted at page 24 [50a–51a] fn. 22, *supra*, the district court subsequently vacated its order barring the FTC from proceeding against Donnelley.

trolling precedent.[26] The court explained that the FTC Act and the Clayton Act were both enacted in 1914 and are *in pari materia*; the purpose of § 5(a)(2) is parallel to that of § 11; there is some overlap between the substantive provisions of the two acts; and it would be an incongruous result for § 11 to be different in any way from § 5(a)(2). While the court applied a rigorous logic in its analysis, we believe it was pulling in the wrong direction. Given the fact that the *Miller* case is much more recent and is based on an additional sixty years' experience with the regulatory scheme in question, we believe § 11 and *Fruit Growers' Express* should be brought into line with § 5(a)(2) and *Miller*, rather than *vice versa*. It appears that the "against the grain" construction engaged in by the district court may have resulted from the following misstatement of who has the burden of establishing the contours of a special exception to a regulatory scheme:

> "*Defendants* [*the FTC*] *have advanced no reason* why Congress should have exempted the subject of competition between air carriers from the FTC's jurisdiction under the Clayton Act, and have given the same subject back to the FTC under § 5(a)(2) of the FTC Act while simultaneously depriving it of jurisdiction over the carriers themselves."[27] *Id.* at 72,943. (Emphasis added).

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[26] The Court took this approach in the face of its avowal that "Section 11 of the Clayton Act is more clearly phrased in subject matter jurisdiction terms than is § 5(a)(2), and consequently *Fruit Growers' Express* does not directly control this case." [1977] Trade Cas. (CCH), at p. 72,942.

[27] The court's statement that Congress "exempted the subject of competition between air carriers from the FTC's jurisdiction under the Clayton Act" is almost certainly incorrect in itself. The statement is apparently based on the court's belief that *Fruit Growers' Express* means that under the Clayton Act, the FTC does not have jurisdiction over any acts (by whomsoever)

Placing the burden on the FTC in this manner runs directly contrary to the Supreme Court's pronouncement that the "burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits . . . ." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44–45 (1948).

Even if we accept the court's approach to the jurisdictional issue, its finding of lack of jurisdiction in this proceeding is based on an erroneous factual assumption. The court stated:

> "Defendants now seek to characterize the complaint as being based in part on plaintiff's abuse of its monopoly position, and the court agrees that there may be cases in which the FTC may properly exercise jurisdiction over restraints of trade in a non-exempt line of commerce despite their effect upon an exempt line. But in this case . . . [i]t is clear from the complaint that plaintiff is accused of working in cooperation with the major air carriers to stifle competition by smaller carriers." [1977–2] Trade Cas. (CCH), at 72,943.

Thus the court's holding is based on an assumption that this is exclusively a conspiracy case. But the complaint alleges that Donnelley's acts, "both individually and in combination with others," are in violation of § 5. Complaint ¶17. As will be seen in the pages that follow, our finding of liability here is not based upon a finding of unfair competition "among air carriers." Rather, liability is based upon Donnelley's abuse of its monopoly position.

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which affect compeition among air carriers. But as we said before, the decision in *Fruit Growers' Express* turned on the fact that certain common carriers were adjudged to be necessary parties to that action. No one has even suggested that any air carriers are necessary parties to this proceeding.

D. *Alleged Unfair Methods of Competition.*

1. *The Alleged Conspiracy.*

Complaint counsel allege that in 1971 Donnelley had decided to begin to publish connecting flight listings for commuter and intra-state carriers, and to combine the listings of all three classes of carriers into only two categories for each city pair—direct and connecting. They say key Donnelley officials then arranged to confer with certificated air carrier representatives at a formal meeting to determine whether the plan met with the certificated carriers' approval. At the meeting the certificated carriers voiced strong opposition to the proposal. Complaint counsel claim the Donnelley officials who attended the meeting carried this message back to their superiors, and a decision not to go through with the changes resulted. All of this adds up to an allegation that Donnelley and the certificated carriers agreed that Donnelley would not change its format so as to dispense with the listing practices challenged in this action.

If these allegations were proved, they could add up to an illegal conspiracy in restraint of trade. However, a close review of the evidence convinces us that there is some doubt whether anyone from Donnelley entered into "an agreement, tacit or express", with the certificated carriers. *Theater Enterprises* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954). The question is so close that a detailed summary of the events transpiring at the time must be set out.

As of 1971 the OAG had for many years published the direct flights of certificated, commuter, and intra-state carriers under three separate headings. And as of 1971 the OAG did not publish connecting flight listings for commuter and intra-state carriers at all. Prior to 1971 representatives of a trade association of commuter air carriers had urged Donnelley to change these policies, but Donnelley had refused.

In 1971 Parrish, who was then the Publisher of the OAG, and Howe, the Publication Manager,[28] changed their minds and concluded that commuter and intra-state connecting flight listings should be published and that the listings of all three classes of carriers should be merged. In an August 18, 1971 memorandum entitled "Merge [sic] of Commuter Air Carrier Flights With Certificated Air Carriers",[29] Howe made a list of the "pros" and "cons" of changing Donnelley's format to incorporate these changes. He listed seven "pros", among which were simplification of the format (there would have been only two listings under each city-pair—direct flights and connecting flights—rather than the four they had then); "line savings"—that is, space saved by removing the headings "Commuters" and "Intra-state" everywhere they appeared in the OAG; "more paid connex potential"—that is, extra revenues realized from payments made to the OAG for the additional connecting flight listings; and "eventual change". Only two "cons" were listed: "certificated carrier objection" and "subscriber objections(?)".

In early September 1971 Howe and Parrish decided to discuss their idea for changing the OAG's format with representatives of the certificated carriers. They decided to go about this by presenting their proposal to the Airlines Guide Committee (the "AGC") of the Air Traffic Conference of America, which was a part of the Air Transport Association of America (the trade association of certificated carriers). The AGC had scheduled a meeting for October 7, 1971, and Howe sent the following teletype message to the AGC on September 10, 1971:

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[28] Howe reported directly to Parrish.

[29] It is clear from the contents of this memo that it is concerned with the listing of commuter and intra-state carrier connections as well.

> "OAG would like to discuss the merger of Certificated, Commuter and Intra-State Air Carrier schedules. OAG thoughts will be presented October 7. We would appreciate carriers coming to the meeting prepared to discuss their respective management opinions. Direct flight listings would be together chronologically as currently shown. Commuter and Intra-State Air Carriers would have the option to purchase on-line connections with Certificated Carriers and vice versa. Only two categories of listings, direct and connections, would exist rather than the present four."

On September 13, 1971 a bulletin containing the agenda for the October 7 meeting was sent to all members of the AGC. *See* CX 99. Item 7 on the agenda was entitled "Merger of Schedules". The description of this item on the agenda was in all material respects like the description in Howe's teletype message. It concluded with the statement that members "should be prepared to discuss their respective management positions."

At the AGC meeting Parrish presented the proposal for changing the format of the OAG and discussed it with the certificated carrier representatives present. At the end of the discussion, a vote was taken. *See Initial Decision*, at p. 21 [107a], Finding 63. Various persons present recorded the outcome. The official minutes of the meeting, which were distributed to all certificated carrier members and the Donnelley officials present, described it as follows: "During discussion [of Item 7] it became obvious that there was no support for the proposal, therefore, no further action was required." CX 9H. Howe's own notes state that "the carriers were with the exception of [American and National Airlines], against the merger of schedule listings." CX 10D. A subsequent memo prepared by him states that "[o]ne [certificated] carrier was con-

cerned in that non-certificated carrier[s] had no restrictions on routes and therefore could parallel the [routes of] certificated carriers at will." CX 19C. The notes of the Allegheny representative at the meeting state: "No mix[,] vote very heavy." CX 89C. TWA's representative to the meeting wrote in a report to his superior: "[I]t was agreed not to merge the schedules." CX 66A

Reich, who was then the Senior Vice President of Donnelley and the man with the final word on any changes in the format of the OAG (Transcript 1183–84), testified that he first learned of the October meeting shortly after it took place. He stated that he had no idea that plans had been made to discuss changes in the format of the OAG with certificated carrier representatives, and that he was surprised and distressed when he learned that this had been done. Transcript 1204–05, 1250. This testimony was not contradicted. He further testified:

> "I was very unhappy with Mr. Parrish because I had considered this subject to be thoroughly decided and . . . while there had been arguments advanced in favor of making this merger, I thought they had been resolved and, therefore, a proposal to change that, it seemed to me to be out of order." Transcript 1205–06.

After he learned that the meeting had occurred, Reich conducted an investigation to determine what had gone on. Transcript 1775, 1889.

After the AGC meeting, and after the internal Donnelley discussions which occurred when Reich learned of the October 7 meeting, both Parrish and Howe urged that the proposed changes in the OAG's format be made.[30] In effect, they urged that action be

[30] Howe testified at the hearings that he changed his mind back and forth on this matter many times. Transcript at 1832.

taken contrary to what they are accused of having agreed to with the certificated carriers. On November 29, 1971 Parrish sent a formal memo to Reich recommending that the listings of all three classes of carriers be merged, and that commuter flights be marked with a square beside the flight number.[31] *See* CX 12. By letter of December 10, 1971 Reich answered him, stating that he was opposed to merging the listings. *See* RX 111. He stated:

> "I am much concerned about the reliability of the service performed by the commuter carriers as of this date both from a standpoint of adherence to schedules and safety. It would seem to me that our best present policy would be to wait until the CAB has taken a greater responsibility in connection with these carriers and has, in effect, given its seal of approval to their operations."

This letter from Reich constituted the last word on the subject, and the changes were not made.[32]

In determining whether Donnelley was influenced not to change the OAG's format as a result of the October 7 meeting, we must determine whether some person at Donnelley was influenced by the meeting and can be said to have agreed, expressly or tacitly, with the certificated carriers not to change the format. Since Parrish and Howe, who attended the meeting "on behalf" of Donnelley, came away from the meeting urging that the format be changed, it is impossible to

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But several days after the October 7, 1971 meeting he sent a memo to Parrish recommending merger. *See* RX 10.

[31] It is clear from the memo that Parrish was also recommending that the OAG publish connecting flight information for commuter and intra-state carriers.

[32] Except that the OAG did begin to list connecting flight information for commuter and intra-state carriers in December 1976. See the discussion of this at page 8 [30a] fn.5, *supra*.

say that they were influenced by the meeting or that they agreed not to make the changes, even though some of the certificated carriers represented at the meeting believed they had agreed. Therefore, we must focus on Reich and what we can infer about his state of mind, as he was the person who had ultimate responsibility for deciding whether to go through with the proposed changes. He testified that when he first learned of the meeting and began to investigate, he was informed that the certificated carrier representatives at the meeting "didn't all feel strongly one way or the other" about the proposed changes in the format of the OAG (Transcript at 1250), and that "there was evidence that [the certificated carriers] were on both sides." (Transcript at 1218). However, Howe testified that when Reich found out about the meeting he sought out background documents to discover what had gone on (Transcript at 1889); and given the flavor of the notes and memos prepared by Howe concerning the meeting, it is unlikely that Reich could have been told anything other than that the certificated carriers strongly opposed the proposed changes. But in any event Reich testified that even if the certificated carriers had been for the proposed changes, he still would have refused to make them:

> "We would have adopted exactly the same policy we did. We were not concerned with [the certificated carriers]. That was one of the reasons I was unhappy with Parrish. This was a decision we wanted to make without any input from other sources. We were jealous you might say of our privacy in publishing the guide." Transcript at 1208.

There is no evidence that Reich, who made the decision not to change the format of the OAG, was even considering any proposed changes, or was influenced to retain the OAG's previous listing policy because of

the certificated carriers' expressed desire. In light of Reich's uncontradicted testimony that he made the decision on his own, we conclude that there is not adequate proof to demonstrate that a conspiracy existed.[33]

In reaching this finding, we reverse the ALJ's determination that Donnelley did conspire with certificated air carriers. The ALJ based his holding that a conspiracy existed on a finding that after the October 7 meeting with the certificated carriers, "Mr. Howe and Mr. Parrish changed their minds about merging schedules and printing commuter connections" (*id.* at p. 40 [129a]), and on a finding that air carriers are

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[33] Complaint counsel point to the fact that Donnelley failed to call Parrish as a witness, noting that he actually attended the meeting as the Publisher of the OAG. They argue that this failure to call him should give rise to an inference unfavorable to Donnelley, and cite *Interstate Circuit* v. *United States*, 306 U.S. 208 (1939), as support. In that case, the Supreme Court did draw an inference unfavorable to the defendants based on their failure to call persons with key knowledge of the events to testify. *See also Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 175 (1973); *NLRB* v. *Dorn's Transp. Co.*, 405 F.2d 706, 713 (2d Cir. 1969). But in *Interstate Circuit*, the defendants "failed to tender the testimony, at their command, of any officer or agent . . . who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action." 306 U.S. at 225. By contrast, in this proceeding Reich and Howe, who may be said to have had information equal to Parrish in regard to the facts in question, testified at length. This is important because "there is a general limitation. . . that the inference cannot fairly be drawn except from the non-production of witnesses whose testimony would be *superior* in respect to the fact to be proved." *Wigmore on Evidence*, § 287, at pp. 286–87 (*Little, Brown & Co.* 1977) (emphasis in the original); *see also NLRB* v. *Dorn's Transp. Co.*, *supra*, at 713 (the testimony of the person who was not called was "critical"). We see no basis on which to conclude that Parrish, if he had testified, would have provided information "superior" to that of Howe and Reich.

"substantial customers" of Donnelley and pay it several million dollars a year for various goods and services (*id.* at p. 21 [107a], Finding 65). The evidence conclusively establishes, however, that Howe and Parrish continued to urge the changes in the OAG's format even after the October 7 meeting. And the fact that the certificated carriers had substantial leverage over Donnelley, because of their many purchases from it, does not prove that Donnelley entered into an illegal agreement with those carriers. Finally, we think it is crucial that the ALJ, in setting out the evidence relating to the alleged conspiracy, failed to consider Reich's role at all. As we said earlier, Reich was the pivotal figure in the conspiracy drama, and his decision not to carry out the proposed changes in the OAG was not shown to be the product of an agreement.

E. *Duty of a Monopolist.*

1. *The legal standard.*

Since we find that a conspiracy between Donnelley and the certificated carriers was not established, we must turn to the question of whether Donnelley, as a monopolist, had some duty under the FTC Act not to discriminate unjustifiably between the competing classes of carriers so as to place one class at a significant competitive disadvantage. Stated another way, we must determine whether, as a matter of law, the owner of a "scarce resource"—here, the OAG—must exploit that resource in a manner which creates no unjustified or invidious distinctions among competitors seeking access to that scarce resource.[34] If it is deter-

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[34] Previous discussions of whether a monopolist has some duty not to discriminate have typically stated the issue so as to involve a monopolist's treatment of its customers or suppliers. In this case, air carriers are required to pay for most connecting

mined that Donnelley did have such a legal duty, then we must consider whether Donnelley breached this duty and thereby violated the FTC Act, by failing: (a) to publish connecting flight information for commuter carriers; and/or (b) to combine the flight schedule listings of all three classes of carriers.

It is important to note how this case differs from ordinary monopolization cases where challenged acts or practices were engaged in to benefit the monopolist competitively, either in the market in which the monopoly power existed or in some adjacent market into which the monopolist had extended its operations. In *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass 1953), *aff'd per curiam*, 347 U.S. 521 (1954), the court held that United Shoe had monopolized the market in shoe machinery in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. The court's holding was based on a finding that United Shoe had obtained its monopoly power by, *inter alia*, engaging in practices which had "operated as barriers to competition". 110 F. Supp. at 297. Foremost among these was its "lease-only" policy, under which it refused to sell its machines. Because this policy eliminated a "second-hand" market in shoe machinery and raised barriers to new entrants, it was found to have injured United Shoe's actual and potential competitors in the

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flight listings, so with regard to Donnelley's failure to list certain connections, we are considering its behavior toward customers of a sort. Direct flight listings, on the other hand, are published in the OAG free; therefore, with regard to Donnelley's failure to combine the listings of all three classes of carriers, we cannot say that the air carriers are customers or suppliers. But whether the affected carriers sell to Donnelley or purchase from it is relatively unimportant. What is important is that, due to Donnelley's monopoly power in the market of information about scheduled passenger air transportation, the OAG is a scarce resource to which an air carrier must have access if it is to compete effectively.

production of shoe machinery and, in turn, to have helped maintain United Shoe's existing monopoly power. Here, by contrast, none of Donnelley's challenged acts is alleged to have maintained or enhanced its monopoly power in the market the OAG dominates.

In *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), Otter Tail was a vertically integrated company which generated electric power, transported it over its electric transmission lines, and distributed it "at retail" to towns in its geographic area. Otter Tail had a monopoly in electric transmission lines in the area. When several towns refused to renew Otter Tail's franchise to distribute power at retail (having chosen to undertake this operation for themselves), Otter Tail refused to supply electric power at wholesale to the towns or to allow its electric transmission lines to be used to transport power from elsewhere. The Supreme Court found a violation of § 2 of the Sherman Act. One of the grounds for this holding was that Otter Tail had used its monopoly power in one market (transmission lines) to enhance a monopoly in another market (retail distribution).[35]

In this case though, Donnelley's policies, which have affected competition in the air transportation market, were not intended to benefit Donnelley in that market.

The question we are presented with is outside the mainstream of law concerning monopolies and monop-

[35] *See also Six Twenty-Nine Productions, Inc.* v. *Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir. 1966), where the court upheld a cause of action alleging that the only licensed television station in a Florida town had used its monopoly in broadcasting to further its plan to create a monopoly in the preparation of television advertising. The court stated: "The theory is that [defendants] used their legal monopoly power in a separate but related field in which a monopolistic regulated industry is not the national policy." *Cf. United States* v. *Griffith*, 334 U.S. 100 (1948), for an example of horizontal extension of market power from one geographic market to another.

olization. Indeed, there is very little law squarely on point. The seminal case regarding our question *Grand Caillou Packing Co.*, 65 F.T.C. 799 (1964), *aff'd sub nom. LaPeyre* v. *FTC*, 366 F.2d 117 (5th Cir. 1966) ("*LaPeyre*"). In *LaPeyre*, the Peelers Company held certain patents which gave it a monopoly in manufacturing and distributing machinery which peeled shrimp. This machinery was virtually indispensable in the shrimp canning industry because of the high cost of peeling shrimp by hand. Peelers had a lease-only policy, and their leasing charge was two times higher for canners located in the Northwest United States than for those located on the Gulf Coast. Peelers explained that the reason for this difference was that the Northwest shrimp were smaller than the Gulf Coast shrimp and required twice as much hand labor to process. Peelers argued that even though a machine to process the smaller Northwest shrimp cost no more to build or maintain than a machine to process the larger Gulf Coast shrimp, their machines were substitutes for hand labor and they were entitled to set the leasing charge for the machines so as to reflect the amount of hand labor saved. In essence, their claim was that they were maximizing their profits by setting the price in each area to reflect what the market would bear.

The same family which owned Peelers Company also owned Grand Caillou, a shrimp canning business on the Gulf Coast. The Commission seized on this fact and held that Peelers' discriminatory pricing policy was an unfair method of competition under § 5 because it was intended to protect Grand Caillou from the competition of the Northwest canners. In a thoughtful and prescient concurring opinion, Commissioner Elman took a slightly different approach:

> "[T]he problem of this case is . . . the duty, if any, of a lawful monopolist to conduct its business in

such a way as to avoid inflicting competitive injury on a class of customers.

. . . . Respondents enjoy a complete monopoly of an economically significant and commercially important product market, *i.e.*, machinery for processing shrimp for canning purposes. Firms possessing monopoly power . . . are . . . subject, under the antitrust laws, to some of the obligations of fair and equal treatment borne by publicly regulated utilities. *See, e.g., Associated Press* v. *United States*, 326 U.S. 1; *United States* v. *Terminal R. R. Assn..*, 224 U.S. 383. A course of conduct that would be lawful if engaged in by a non-monopolist may, therefore, be an unfair method of competition when engaged in by a monopolist.

. . . . Respondents, by charging a monopolist's discriminatory price, have prevented the equalization of processing costs made possible by the invention of shrimp processing machinery, and have thereby prevented Northwest canners from competing effectively.

. . . . The result, which is not dictated by efficiency . . . but by monopoly power, is clearly opposed to the objectives of antitrust policy . . . . In the circumstances respondents' refusal to treat the Northwest and the Gulf Coast shrimp canners on equal terms is an abuse of monopoly power. It has substantially and unjustifiably injured competition in the shrimp canning industry. It is therefore an unfair method of competition forbidden by Section 5." *Id.* at 867–69.

On appeal, the Fifth Circuit affirmed the idea of a special obligation on the part of a monopolist not to injure customers:

"[T]he problem of this case is . . . the duty of a lawful monopolist to conduct its business in such a way as to avoid inflicting competitive injury on a class of customers. . . . The majority found that petitioners were attempting to protect their own interests as shrimp canners (Grand Caillou) from the competition of the Northwest canners. Commissioner Elman did not agree on the question of motive. His rationale was that the petitioners were simply attempting to maximize their profits, and that they were charging what the traffic would bear with, as it happens, discriminatory results. We need not resolve these contrary findings as to motive.

Both the majority and Commissioner Elman found that the central characteristic was the same—the utilization of monopoly power in one market resulting in discrimination and the curtailment of competition in another. . . . . [T]here is abundant evidence in the record in support of the Commission's conclusion that Peelers leasing procedure is innately discriminatory and anti-competitive in its effect and that in circumstances of the instant case, the refusal to treat the Northwest and the Gulf Coast shrimp canners on equal terms has substantially and unjustifiably injured competition in the shrimp canning industry. It is therefore an unfair method of competition forbidden by Section 5." 366 F.2d at 120–21.

In the recent case of *Fulton* v. *Hecht*, 580 F.2d 1243 (5th Cir. 1978), the Fifth Circuit reaffirmed the Commission's approach in *LaPeyre*. There, a South Florida dog-track operation, the alleged monopolist, refused to renew its racing contract with the plaintiff, who raised and raced greyhounds. Plaintiff claimed this action was taken because of unfavorable testimony he had given about defendant before the state board which regu-

lated dog tracks. Sidestepping the issue of whether defendant possessed monopoly power, the court held that plaintiff had failed to make out a conventional § 2 case "because he did not present any evidence that [defendant] used its power to enhance or maintain its position." *Id.* at 1247. The court then moved to plaintiff's alternative claim that under § 2 "a monopolist has a duty to deal fairly with anyone who seeks to compete in an adjacent market." *Id.* The court held that defendant had no such duty. But it said:

> "This is not to say that a monopolist's behavior having inevitable anticompetitive or other undesirable economic effects solely in an adjacent market can never violate any of the antitrust statues. E.g., this court has held that § 5 of the Federal Trade Commission (FTC) Act, 15 U.S.C. § 45, prohibits a monopolist from discriminating between buyers in the price he charges for his product. See *LaPeyre* v. *FTC*, 366 F. 2d 117 (5th Cir. 1966). Thus, under § 5 of the FTC Act, a monopolist may be required to use uniform and reasonable criteria when dealing with those who compete in an adjacent market. Such a duty is no help to the instant plaintiff because his action is based on § 2 of the Sherman Act, and there is no private cause of action for violation of the FTC Act." *Id.* at 1249 fn.

See also Laitrim Corp. v. *King Crab, Inc.*, 244 F. Supp. 9 (D. A1. 1965); *cf. Peelers Co.* v. *Wendt*, 260 F. Supp. 193 (W.D. Wash. 1966).

Aside from the precedent cited above, there are collateral lines of authority which support imposition of some duty on a monopolist not to discriminate in dealing with persons who compete with one another in an adjacent market. Such a duty—which we will call a

duty not be "arbitrary"[36]—would be consistent with common law principles of fair dealing, such as those that apply to innkeepers, common carriers, and businesses affected with a public interest. *See* Sullivan, *Antitrust*, § 48, at p. 125 (West 1977). Judge Learned Hand once stated that "Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case." *United States* v. *Associated Press*, 52 F. Supp. 362, 373 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

Imposing on a monopolist a duty—whether the standard is not to be unreasonable or not to be arbitrary—would also be consistent with action taken by the Supreme Court in important joint venture cases. In *United States* v. *Terminal Railroad Ass'n.*, 224 U.S. 383 (1912), several railroad companies had joined together to form the Terminal Railroad Association, which had gained control of all the rail routes of access to St. Louis. These "proprietary companies" agreed among themselves that unanimous consent would be required before a non-member railroad could be admitted to the Association or use the facilities. The Supreme Court held that the combination of all the routes of access under the exclusive ownership and control of less than all the railroad companies needing to use them constituted a violation of both § 1 and § 2 of the Sherman Act. Significantly, from the point of view of the case now before us, the Court ordered the Association to provide that all other railroads could become members of the Association, or use the Association's facilities, on reasonable and nondiscriminatory terms. In *Associated Press* v. *United States*, *supra*, more than 1200 newspapers belonged to Associated Press ("AP"), a cooperative association en-

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[36] *See* pages 44–45 [76a], *infra*, for a discussion of what we mean by the term arbitrary.

gaged in the collection, assembly, and dissemination of news. AP By-Laws prohibited all members from selling news to non-members, and granted each member power to block its non-member competitors from membership. The Court found that, although AP did not have a monopoly in its field, it was the largest news agency and denial of an opportunity to acquire news from it could be a significant disadvantage to "the publication of competitive newspapers." *Id.* at 13. The Court held that the restrictive By-Laws constituted a violation of § 1 and entered an order stating that AP could not maintain By-Laws which permitted discrimination against applicants-for-membership who competed with existing members.

Those two cases are different from the case at hand in that they both involved an association of horizontal competitors who controlled a competitively important facility that "unassociated" competitors lacked and could not reproduce. *See* III Areeda and Turner, *Antitrust Law*, § 729g, at p. 243 (Little, Brown & Co. 1978). Nevertheless, the Court's orders demonstrate a concern that "scarce resources" be made available, on a non-discriminatory basis. *Cf. Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). And if a duty not to discriminate unreasonably can be imposed on a joint venture conferring significant competitive advantages on its competitor-members, it is a small step to impose a duty not to be arbitrary on a monopolist who controls a scarce resource which cannot be duplicated by the joint efforts of companies seeking to use it.

Policy reasons for imposing a duty not to be arbitrary are compelling. Since we are dealing with a monopolist, the victimized customer or supplier cannot turn to an alternative source. Thus, a refusal by the monopolist to deal, or to deal otherwise than on discriminatory terms, essentially means the disfavored person suffers a competitive disadvantage which cannot be avoided. Such a result should not come about

from an arbitrary decision by the monopolist. Moreover, arbitrary decisions may affect resource allocation in the adjacent market—that is, favor one competitor over another for reasons entirely divorced from considerations of efficiency or willingness of the disfavored seller to compete effectively. *See* Sullivan, *supra*, § 48, at p. 131. It is inconsistent with the fundamental goals of antitrust to permit such results if they can be avoided at acceptable costs.

Formidable policy reasons have been advanced in opposition to the existence of such a duty. For example, it has been argued that banning arbitrary refusals to deal by monopolists would place antitrust enforcers in the undesirable position of determining the legality of refusals based on social, political, or even personal reasons. The example has been given of a monopoly movie theater which refuses to admit men with long hair, or a monopoly newspaper which refuses to publish advertising from cigarette manufacturers. *See* III Areeda and Turner, *supra*, § 736a, pp. 270–71. But under the standard we are enunciating now, neither of these examples would trigger antitrust scrutiny. Presumably there is no competition among persons who attend movies, and therefore arbitrarily excluding one group of patrons or another would not inflict a competitive injury. Similarly, refusing to publish ads for all cigarette companies would not place any of those companies at a disadvantage *vis a vis* a competitor. Certainly, it would be unwise to offer antitrust enforcement as a knight errant, bound to right every wrong inflicted by dominant companies; the goal here rather is to protect a *competitive* process by outlawing arbitrary monopoly behavior that inflicts a competitive injury.[37] But even when it is so limited, it is probably

[37] The result here may be inconsistent to some extent with the theory of the *Colgate* doctrine, *United States* v. *Colgate &*

true that imposing a duty not to be arbitrary will require antitrust enforcers to occasionally pass on the legality of refusals based on social, political, or personal reasons.[38] However, notions of fair dealing are part of the inheritance antitrust law received from the common law.[39] *Cf. United States* v. *Associated Press*, 52 F. Supp. 362 (S.D.N.Y. 1943); Sullivan, *supra*, § 48, at p. 125. And this inheritance should not be shunned because it may produce hard cases.

Another reason often advanced in opposition to imposing a duty not to be arbitrary is that refusals to deal at all will not be the only question presented; rather, there will be questions concerning discriminatory terms which do not amount to a total refusal to deal. Such questions, it is argued, will inevitably lead courts into complex issues regarding what constitutes a reasonable price, whether terms are really comparable, and so on. Thus, an order directing a seller to deal on reasonable terms, or to not be arbitrary, will lead a court or agency to specify what constitutes reasonable terms and to police compliance over time—a regula-

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Co., 250 U.S. 300 (1919). In *Colgate* the court recognized the right of a trader "freely to exercise his own independent discretion as to parties with whom he will deal", at least in the absence of any purpose to create or maintain a monopoly. Here there is no such purpose, but we believe the philosophy of *Colgate* must give way to a limited extent where the business judgment is exercised by a monopolist in an arbitrary way.

[38] Consider, for example, a monopoly newspaper refusing to take ads from a particular cigarette company because of the style of prior ads or the political views of its president.

[39] Indeed, "fairness" is the express standard mandated by Congress in § 5 of the FTC Act. Since this proceeding was instituted under Section 5, we have no occasion to decide whether any similar duty not to be arbitrary can be imposed on monopolists under Section 2. We see no persuasive reason, however, why a similar duty would not arise under the Sherman Act.

tory role that courts have wisely shunned whenever possible. Since these problems are seen as unavoidable, it is urged that this problem should be left to the legislature.

We agree that it is generally undesirable for courts to place themselves in a position of monitoring the pricing activities or other variable, on-going activities of a monopolist. But we are reviewing a refusal by Donnelley to list certain connecting flight information, and to group the listing of all carriers together—matters not involving pricing questions at all. As is demonstrated in the application of the law to the facts of this case, *infra*, we feel comfortable scrutinizing Donnelley's conduct on the two challenged issues to determine whether the policies were arbitrary, and drafting an order which will not involve unusual supervisory burdens.[40] In addition, we feel that this is not necessarily an area that should be left to the legislature. There are too many varied bottleneck monopolies in this country to expect that the problem would lend itself to resolution through a single sweeping formulation. On the contrary, this is a prime area for the case-by-case approach embodied in the common law

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[40] It is important to note the qualifying conditions that apply here. As already noted, the arbitrary action by a monopolist must cause a competitive injury, and the doctrine is more easily applied where it does not put the court in an on-going regulatory role. In addition, this is not a case where a seller is attempting to go out of business and the court is asked to mandate continued operations; here it's clear that the OAG will continue to publish and the only issue involves its format. Finally, an order mandating a certain format in publication would not require the OAG to increase its capacity significantly or incur other major expenses. There, too, a court might be reluctant to act since it could not guarantee the monopolist a return on investment necessary to expand capacity or make major changes in operations. *See* III Areeda & Turner, *supra*, § 729g at p. 243 n.25.

and carried out by adjudicative tribunals. Moreover, by commanding the Commission to seek out and stop "unfair methods of competition", the legislature has already spoken. That standard, like the common law, was meant to be flexible and capable of application to new and changing economic conditions.

We come finally to the question of how to define the term "arbitrary." In spite of the broad language in *LaPeyre* and *Fulton* v. Hecht, *supra*, we do not suggest that a monopolist must always deal on precisely equal terms or that a court or the Commission should measure the reasonableness of a monopolist's conduct *vis a vis* those with whom it deals against an inflexible standard. Rather, we should limit ourselves to a concern with conduct which results in a substantial injury to competition and lacks substantial business justification. In examining the question of business justifications, the economic self interest of the monopolist would be the major but not the exclusive consideration. Where there is little justification for a business policy, the antitrust laws can require that the monopolist take into account the effect on competition of its actions in the line of commerce made up of its customers, suppliers, or others wishing to deal with it.

Of course, we cannot in this opinion anticipate and react to the multitude of fact situations that could arise. Our application of this standard to the facts of Donnelley's publication policies should provide some indication of what we mean by "arbitrary".

2. *Applying the legal standard to Donnelley's acts.*

We believe Donnelley's failure to list connecting flight information for commuter carriers was arbitrary and in violation of the standard set out above.[41] The

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[41] As we said at p. 7 [29a] fn.4, *supra*, there was no showing that Donnelley's failure to list intra-state connecting flights

discussion at pages 7–9 [30a–32a], *supra*, demonstrates that the failure to list this information caused commuter air carriers significant competitive injury. On appeal, Donnelley has offered no explanation whatsoever for its refusal to list commuter connecting flights, and we can conceive of no reason, particularly in light of the fact that Donnelley changed its policy on this score with apparent ease and no ill effects after the complaint in this case was issued.

From documents introduced at the hearing, it appears that Donnelley viewed the issue of listing commuter and intra-state connecting flights as being tied to the issue of merging the listings of all three classes of carriers (*see, e.g.*, CX 11; CX 12B), and decided not to list such connecting flights (until 1976, at least) because it had decided not to merge the listings of all three classes of carriers. But in an internal Donnelley report prepared in 1972, it was revealed that commuter and intra-state connections could be included in the OAG in separate groupings for only $6000. Yet Donnelley did not change its format to include them until December 1976, eight months after this suit was brought. Furthermore, as we said before, Donnelley has made no mention of any adverse effects resulting from the 1976 change in this policy. We hold that Donnelley's failure to list commuter connecting flights was arbitrary, caused commuter air carriers significant competitive injury, and constituted a violation of § 5.[42]

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caused those carriers any competitive injury, and therefore we do not hold that such failure constituted a violation of § 5.

[42] On appeal, Donnelley argues that no order should be entered regarding the publishing of connecting flight information, because it began to publish such information in 1976 and there is no evidence that it is likely to stop. But we do not believe that the discontinuance of a practice eight months after a complaint is issued against it is anything more than a reaction to the suit.

Donnelley's failure to merge the listings of non-certificated carriers with those of certificated carriers has also caused significant competitive injury to non-certificated carriers. This is so because most users of the OAG read the listings of flights between a city-pair from top to bottom and pick the first convenient flight; therefore, listing the flights of certificated carriers before the flights of non-certificated carriers often results in users picking a certificated flight without even looking at the listings for non-certificated carriers. *See* pages 13–17 [36a–42a], *supra*.

We cannot say, however, that the failure to merge the listings of all three classes of carriers was arbitrary. Donnelley states that its separate listing policy is justified because each of the three classes of carriers has a different legal status and provides a fundamentally different level of service. They argue that separate listing is therefore required to put the OAG's users on notice as to what level of service is being offered in connection with a particular flight. In rebut-

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Cf. United States v. *Parke, Davis & Co.*, 362 U.S. 29, 48 (1960). Accordingly, we have entered an order provision regarding the listing of connecting flight information. And although we do not hold that Donnelley's failure to publish intra-state connections violated § 5 (*see* page 7 [29a] fn.4, *supra*), the order in this case prohibits Donnelley from arbitrarily discriminating against *any* carrier of class of carriers in the listing of connecting flight information. We believe it is reasonable to extend the order to all air carriers because, even though complaint counsel did not attempt to show that intra-state carriers had been injured by not having their connecting flights listed, it is reasonable to assume that a failure to list the connecting flights of any class of air carrier would result in a competitive injury to that class. Extending the order in this way will serve to prevent future violations similar to those found here and is justified under our wide discretion to fashion "relief to restrain other like or related unlawful acts." *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959).

tal, complaint counsel established that the differences between the three classes of carriers are less extreme than Donnelley claimed. *See* pages 12–17 [36a–42a], *supra*. Complaint counsel also showed that Donnelley has been less than perfectly pure in carrying out its separate listing policy, as it lists the flights of commuter replacement carriers and some commuter-type foreign air carriers with the flights of certificated carriers. *See* pages 17–20 [42a–45a], *supra*.

On balance, we find that Donnelley had a substantial business justification for its separate listing policy. The decision not to merge commuters' listings was based on Donnelley's belief that certificated carriers provide more reliable flight information for listing in the OAG, and are generally faster, safer, and more comfortable than commuter carriers. And with respect to intra-state carriers, it appears that the legal requirement that these carriers not accept passengers or baggage engage in an interstate journey led Donnelley officials to conclude that intra-state carriers should be carefully noted in the OAG as being different from other carriers. While we might have decided that it would be better and fairer to combine the listings of all three classes of carriers and denote commuter and intra-state flights by the use of some symbol, we cannot say that the different course Donnelley chose was so completely lacking in reasoned support as to be arbitrary.

F. *The First Amendment.*

The order entered by the ALJ in this case prohibited Donnelley from discriminating among the three classes of carriers in the order of listing of their flights or in the publication of connecting flight information. On appeal, Donnelley asserts that both of these prohibitions abridge their First Amendment rights and are unconstitutional. Since we reverse the ALJ's find-

ing that Donnelley's failure to merge the listings of all three classes of carriers was in violation of the antitrust laws, we concern ourselves only with Donnelley's claim regarding connecting flight listings. And we reject Donnelley's contention that an order provision which relates to the content of the OAG is unconstitutional.

Donnelley has engaged in conduct which violates § 5 of the FTC Act, 15 U.S.C. § 45. Given this fact, we are required to devise "a reasonable method of eliminating the consequences of the illegal conduct." *Nat'l Soc'y of Professional Eng'rs* v. *United States*, 435 U.S. 679, 697 (1978). The only conceivable method of remedying the consequences of Donnelley's prior illegal conduct is to order them not to discriminate arbitrarily against any air carrier or class of air carriers in the listing of connecting flights. The effect of this order may be to require Donnelley to publish information in the OAG which it might otherwise choose not to (as, indeed, it has in the past); but that does not mean that the FTC, as an arm of the state, has impermissibly intruded on Donnelley's First Amendment rights. In *Nat'l Soc'y of Professional Eng'rs, supra*, the district court had found the Society guilty of violation of the antitrust laws for promulgating an ethical canon which prohibited competitive bidding; accordingly, it entered an order prohibiting the Society from adopting any policy statement, guideline, etc., which stated or implied that competitive bidding is unethical. The Society argued before the Supreme Court that this order abridged its First Amendment rights. The Court dismissed this argument in short order:

> "Having found the society guilty of a violation of the Sherman Act, the District Court was empowered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and to eliminate its consequences.

> While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequences of the violation. Just as an injunction against price fixing abridges the freedom of businessmen to talk to one another about prices, so too the injunction in this case must restrict the Society's range of expression on the ethics of competitive bidding. The First Amendment does 'not make it . . . impossible ever to enforce laws against agreements in restraint of trade. . . .' In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may infringe upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations." *Id.* at 697 (citations omitted).

Cf. Lorain Journal v. *United States*, 342 U.S. 143, 155–56 (1951). We believe this language is dispositive of the First Amendment issue raised by Donnelley.

In reaching this conclusion, we reject Donnelley's contention that *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), is controlling. In that case the Court was required to pass upon the constitutionality of a Florida statute requiring any newspaper which assailed the personal character or official record of any candidate for political office to print free of cost any reply the candidate might wish to make. The Court found the statute violative of the First Amendment, but the language it used in doing so left it clear that the Court was talking about "political" speech and the special role of newspapers in the dissemination of such speech:

> "[U]nder the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access

> inescapably dampens the vigor and limits the variety of public debate . . . . A newspaper is more than a passive receptacle or conduit for news, comment and advertising." *Id.* at 257–58.

The OAG, by contrast, is not a newspaper, and it is *not even* a "passive receptacle or conduit for news, comment, and advertising"—it is a passive receptacle only for "commercial" speech.[43] Of course, the fact that the OAG is not a newspaper and contains only commercial speech does not mean that it is not entitled to First Amendment protection. *See, e.g., Virginia State Bd. of Pharmacy, supra.; Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). But it does mean that it is not entitled to the same high level of protection that is applicable to other forms of speech. *See Ohralik* v. *Ohio State Bar Ass'n.*, 436 U.S. 447 (1978); *Friedman* v. *Rogers* 47 U.S.L.W. 4751 (S.Ct. Feb. 20, 1979), we believe that the commercial speech in question in this case is radically different from the political speech involved in *Tornillo*, and that that case is therefore not controlling.

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[43] Though not all of the listings contained in the OAG are paid for by the carrier involved, we believe the information contained therein still qualifies as commercial speech because it is information as to who is offering what service and at what price. *See Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Furthermore, the information contained in the OAG serves as the basis on which millions of private economic decisions are made, which in the aggregate have a substantial effect on how certain resources are allocated. *See id.*

APPENDIX D

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9079

In the Matter of
THE REUBEN H. DONNELLEY CORPORATION,
a corporation.

INITIAL DECISION

[filed March 7, 1979]

JAMES P. TIMONY
Administrative Law Judge

MARCH 6, 1979

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PRELIMINARY STATEMENT

By a complaint issued on April 13, 1976, The Reuben H. Donnelley Corporation ("Donnelley") is charged with a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Respondent Donnelley is a subsidiary of the Dun and Bradstreet Companies, Inc., which in 1974 had combined operating revenues of over $500 million and total assets of about $345 million. Donnelley is a publishing company which publishes the "Official Airline Guide—North American Edition" ("OAG"), a directory of flight schedules and fares for scheduled air transportation. The OAG is published twice monthly and is sold to air carriers, travel agents, businesses and the general public.

The complaint alleges that the OAG is the only publication sold in the United States that combines the passenger flight schedules of all domestic air carriers and that it is the standard reference for ascertaining flight schedules between city pairs in North America.

Scheduled air passenger transportation in the United States is provided by three categories of airlines: certificated air carriers, commuter air carriers, and intrastate air carriers. The complaint alleges that Donnelley has refused to publish flight schedules for commuter and intrastate air carriers on the same terms as apply to the publication of flight schedules of certificated air carriers. More specifically, the complaint alleges that respondent has refused: (1) to publish in the OAG schedules of connecting flights involving commuter air carriers,[1] and (2) to chronologically integrate schedules of commuter air carriers and in-

[1] In December 1976, respondent started publishing the connecting flights of commuter air carriers.

trastate air carriers with those of certificated air carriers.

The complaint further alleges that Donnelley violated Section 5 "individually and in combination with others," stating that Donnelley's policies have been formulated and modified by respondent "following consultations" with certain certificated air carriers, and that Donnelley has "solicited and relied upon the views of certificated air carrier competitors" in refusing to change its publication policies.

By an answer filed May 28, 1976, respondent admitted some but denied many of the allegations of the complaint. Among the more important issues raised by the answer, respondent: (1) denied that significant competition exists among the three categories of air carriers; (2) stated that there are numerous sources of passenger flight schedule information other than the OAG; (3) stated that it had solicited the views of certificated air carriers concerning separate listing of certificated air carriers, commuter air carriers, and intrastate air carriers, but that it has neither relied nor acted upon those views; (4) stated that these matters are not subject to the jurisdiction of the Federal Trade Commission; and (5) stated that the relief sought, compelling Donnelley to publish flight schedule listings in a manner conflicting with Donnelley's judgment, would violate the First Amendment to the United States Constitution.

Pursuant to prehearing orders, counsel for the parties stipulated that (1) the complaint does not allege unlawful monopolization in the publication and sale of passenger flight schedules of domestic air carriers; and (2) the complaint does not allege unlawful effects on companies other than air carriers, including potential competitors of the respondent in the sale and distribu-

tion of passenger flight schedules for domestic air carriers. (Joint Statement filed September 24, 1976.)

After issue was joined, respondent filed a motion to dismiss, asserting that the Commission lacks subject matter jurisdiction over the acts of a publisher who sells and distributes information about air carriers who are themselves subject to CAB jurisdiction. The claim was based on Section 5(a)(2) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(2), which provides that carriers subject to the Federal Aviation Act of 1958 are exempt from the Commission's jurisdiction.

By an order dated September 21, 1976, I invited the CAB to file an *amicus* brief commenting on the issues presented by the complaint. On February 2, 1977, the General Counsel of the CAB filed an *amicus* brief denying, in effect, that the CAB had primary jurisdiction over this matter, or that the CAB had sanctioned the conduct alleged in the complaint. The *amicus* brief states that it is "clear that the exercise of Commission jurisdiction would not cause a collision with the Board's jurisdiction over air carrier competition." After further briefing, I denied the motion to dismiss by an order dated March 30, 1977. By an order dated July 12, 1977, the Commission denied Donnelley's petition for extraordinary review, holding that there had been no abuse of discretion.

Respondent Donnelley sued in the United States Court for the Northern District of Illinois to prevent further action in the administrative proceeding. I set hearings in the administrative case to begin on September 9, 1977. Well into the defense of the case, I received on November 13, 1977, an order from United States District Court Judge Bernard M. Decker, finding lack of Federal Trade Commission jurisdiction, enjoining further hearings, and ordering that the Commission dismiss the complaint. *Donnelley Corp.* v.

FTC, 1977-2 Trade Cases ¶ 61,721 (N.D. Ill. 1977).[2] By an order dated December 20, 1977, Judge Decker vacated his previous order enjoining further administrative proceedings, holding that Donnelley had failed to exhaust its administrative remedy.[3] *Donnelley Corp.* v. *FTC*, 1977-2 Trade Cases ¶ 61,783 (N.D. Ill. 1978).

This interruption in the administrative proceeding resulted in an eleven month delay.[4] Defense hearings in *Donnelley* resumed on October 16, 1978, and ran through November 17, 1978. Complaint counsel had rebuttal on December 1, 1978.

The findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony and the exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence supporting each finding. The following abbreviations have been used:

CX —Complaint counsel's exhibit, followed by its number and the referenced page(s);

RX —Respondent's exhibit, followed by its number and referenced page(s);

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[2] I therefore set Docket 9080, *Kaiser Aluminum & Chemical Corp.*, for trial, to commence December 1, 1977.

[3] On cross-appeal, the United States Court of Appeals for the Seventh Circuit held on August 2, 1978, that venue in Chicago was improper and transferred the case to the district court in Washington, D.C. *Donnelley Corp.* v. *FTC*, 580 F.2d 264 (7th Cir. 1978). Ruling from the bench, Judge Gesell dismissed Donnelley's complaint on September 28, 1978.

[4] Before the administrative hearings in the *Donnelley* case could resume, I finished the trial in the *Kaiser* case, wrote the initial decision in *Amway Corporation*, Docket 9023, which I had deferred to start the *Donnelley* hearings (initial decision filed June 23, 1978), and wrote the initial decision in the *Kaiser* case (initial decision filed October 13, 1978).

CPF—Complaint counsel's proposed findings;
RPF—Respondent's proposed findings.

FINDINGS OF FACT

Glossary

1. A "certificated air carrier" is an air carrier that holds a certificate of public convenience and necessity issued by the Civil Aeronautics Board ("CAB") authorizing the air carrier to fly its routes in commerce in the United States. (Fugere 210; 49 U.S.C. §§ 1371-72)

2. The CAB has created by regulation a classification of air carriers known as "air taxi operators" which operate smaller airplanes (not more than 7,500 pounds payload and having thirty or fewer passenger seats) but which do not hold a CAB certificate. (14 C.F.R. 298).

3. "Commuter air carriers" do not hold CAB certificates. An air taxi which flies passengers on at least five round trips per week between two or more points and publishes flight schedules which specify the times, days of the week and places between which such flights occur, is a "commuter air carrier." (14 C.F.R. 298.2(f)) An air carrier may operate as a commuter air carrier on some of its routes while holding CAB certification on other routes. (CX 188A-F; Nelson 4395)

4. An "intrastate air carrier" is an air carrier which operates solely within a state of the United States and which does not hold a certificate of public convenience and necessity or foreign air carrier permit issued by the CAB. (Griffin 884) An air carrier may operate as an intrastate air carrier on some of its routes while operating as a commuter air carrier on other routes. (Dzendolet 2624-26)

5. A foreign air carrier is any person, not a citizen of the United States, who engages in air transportation between any place in the United States and any place outside thereof. (49 U.S.C. § 1301(38))

6. "Trunk air carriers" are certificated air carriers which operate across the country. An example of a trunk air carrier is American Airlines. (CX 196D; CX 196Z80–Z81) "Local service air carriers" are certificated air carriers. In the late 1940's the CAB started certifying these carriers to provide air service to smaller cities. A federal subsidy payment program was instituted for these carriers. They have since evolved from "feeder" airlines into "regional" carriers with only certain of their operations eligible for subsidy. An example of a local service or regional carrier is Piedmont Airlines. (CX 108 at 7; CX 196Z77)

7. "Replacement carriers" are commuter carriers which agree to substitute for local service carriers on routes that the certificated carriers are obligated to serve but are not doing so at a profit. (CX 107 at 9)

8. A "city pair" is two cities between which there is scheduled airline service. (Fugere 211)

9. A "direct flight" is a flight between a city pair, either nonstop, or, if there are stops, normally involving no change of aircraft or flight number. (Complaint and Answer ¶1; Fugere 211)

10. A "connecting flight" is two or more direct flights used in conjunction with each other to provide transportation between a city pair. (Answer ¶1; Fugere 212)

11. "On-line connections" are connections between two or more direct flights of the same air carrier. (Fugere 211)

12. "Interline connections" are connections involving direct flights of at least two separate air carriers. (Fugere 212).

13. "Interline agreements" are agreements among and between carriers, involving a variety of business arrangements such as ticketing, reservation procedures, joint use of facilities, joint reservations. Such agreements are filed with and approved by the CAB. (Fugere 212–13)

14. "Free or industry connections" are connections submitted by air carriers to respondent and published by respondent without charge to the air carrier based on limitations established by respondent. (RX 66Z18–Z62; Fugere 213–14; Nelson 2487)

15. "Paid connections" are connections which do not qualify as free connections under the limitations established by respondent, and they are published by respondent at the expense of the air carrier that requests the listing. (RX 66Z18–Z62; Fugere 215; Nelson 2502–03)

Respondent

16. Respondent, The Reuben H. Donnelley Corporation ("Donnelley"), is a corporation organized, existing, and doing business under the laws of the State of Delaware, with its principal office and place of business at 825 Third Avenue, New York, New York. It is a wholly-owned subsidiary of Dun & Bradstreet Companies, Inc., 299 Park Avenue, New York, New York. Donnelley is engaged in the publication, distribution and sale of publications relating to travel, including the Official Airlines Guide-North American Edition ("OAG"), a twice-monthly publication which combines into one directory the passenger flight schedules and fares of substantially all the scheduled air carriers in the United States, Mexico, Canada and the Caribbean. (Complaint ¶2; Answer ¶2)[5] In 1962,

[5] Effective January 1, 1979, Official Airline Guides, Inc., a Delaware corporation and a wholly-owned subsidiary of Dun &

Donnelley acquired the OAG from its publisher, American Aviation Publications, Inc. (CX 24A; Reich, 1181)

Interstate Commerce

17. Respondent is now and has been at all relevant times engaged in selling and distributing the OAG to subscribers located throughout the United States, from its offices located at 2000 Clearwater Drive, Oak Brook, Illinois, and from other Donnelley facilities. Respondent is therefore engaged "in commerce" and its business activities "affect commerce," within the meaning of the Federal Trade Commission Act. (Complaint and Answer ¶¶3, 4; Fink 1370; Budzic 3092; Davidoff 3170)

Official Airline Guide

18. The OAG was first published as early as 1943 under the title "Universal Airline Schedules." (CX 52C) At first it merely reproduced timetables of each scheduled air carrier. (RX 19D, RX 572, RX 573)

19. In 1958, the OAG started publishing flight schedule listings in the "to-city" format which currently is used in the OAG, rather than simply in a series of individual air carrier's timetables. (RX 19D) The OAG organized flight schedule listings by displaying in alphabetical order the cities to which there was scheduled air carrier passenger service, displaying under each of these cities in alphabetical order the cities from which there was scheduled air carrier passenger service to the city of destination. (RX 258, 571, 573, 574)

Bradstreet Companies, Inc., assumed responsibility for publication of the Official Airline Guide, formerly published by the Transportation Guides and Services Division of The Reuben H. Donnelley Corporation. (RPF p. 7)

Publishing Policy

20. Before December 1, 1976, respondent published in the OAG four separate categories of airline schedules in the following sequence:

Certificated Air Carrier—direct flights (published with no headings).

Certificated Air Carrier—connecting flights (published under the heading "Connections").

Intrastate Air Carrier—direct flights (published under the heading "Intra-State").

Commuter Air Carrier—direct flights (published under the heading "Commuter Air Carriers").

(Complaint and Answer ¶12; CX 174; RX 7A; RX 16A)

21. Before December 1, 1976, respondent published in the OAG three categories of direct flight schedules: certificated carriers (including foreign and replacement carriers), intrastate, and commuter carriers, with each category separate and in chronological order:

6/

Freq.	Leave	Arrive	Flight	Class	Eq	MI	S
To SANTA ANA, CALIF.						PST	SNA
LOS ANGELES, CALIF.						PST	LAX
	LAAX	SAAX	DONT	DAWT			
	1 A	12.70	L02	11.72	27.44		
	1 INTRASTATE						
	GW A	15.74	1.26	17.00	34.00		
	2 S	14.50	1.17	15.75	31.50		
	2 INTRASTATE						
	RW S	16.67	1.33	18.00	36.00		
	R	8.33	.67	9.00	18.00		
	RW YH	14.00	OC M	6.50			
X6	11:00a	L	11:26a	PW	812	S	D93	0
6	11:30a	O	11:50a	PW	506	S	DC9	0
	6:40p	L	7:04p	PW	935	S	DC9	0
	9:05p	L	9:30p	RW	729	S	D95	0
6	10:25p	L	10:31p	FA	775	S	D95	0
	INTRA - STATE							
X7	7:30a	O	7:45a	OC	783	K	737	0
7	10:00a	O	10:15a	OC	731	K	737	0
6	11:30a	O	11:45a	OC	719	K	737	0
2567	12:00n	O	12:15p	OC	519	K	737	0
2567	1:30p	O	1:45p	OC	731	K	737	0
5	2:00p	O	2:15p	OC	735	K	737	0
X6	6:00p	O	6:15p	OC	761	K	737	0
	COMMUTER AIR CARRIERS							
12	6:35a	L	7:04a	GW	354	A	DTO	0
5	7:00a	L	7:25a	GW	392	A	DTO	0
X5	7:10a	L	7:35a	GW	310	A	DTO	0
5	7:35a	L	7:56a	GW	312	A	DTO	1
X56	7:45a	L	8:10a	GW	316	A	DTO	0
X1	8:00a	L	8:25a	GW	318	A	DTO	0
1	8:16a	L	8:35a	GW	322	A	DTO	0
X235	8:50a	L	9:15a	GW	328	A	DTO	0
23	8:50a	L	9:25a	GW	326	A	DTO	1
3	9:45a	L	10:10a	GW	326	A	DTO	0
X3	9:55a	L	10:20a	GW	330	A	DTO	0
	11:05a	L	11:30a	GW	334	A	DTO	0
	12:05p	L	12:40p	GW	328	A	DTO	1
	1:10p	L	1:45p	GW	340	A	DTO	1
	1:55p	L	2:30p	GW	342	A	DTO	1
	3:20p	L	3:55p	GW	344	A	DTO	1
X136	3:25p	L	3:55p	GW	345	A	DTO	0
6	4:15p	L	4:40p	GW	352	A	DTO	0
X6	4:15p	L	4:50p	GW	350	A	DTO	1
2	4:55p	L	5:20p	GW	356	A	DTO	1
X26	5:10p	L	5:45p	GW	360	A	DTO	1
456	6:00p	L	6:25p	GW	358	A	DTO	0
123	6:00p	L	6:35p	GW	360	A	DTO	1
7	6:50p	L	7:25p	GW	366	A	DTO	1
456	6:55p	L	7:20p	GW	364	A	DTO	0
123	6:55p	L	7:30p	GW	366	A	DTO	1
45	7:20p	L	7:45p	GW	370	A	DTO	0
127	7:50p	L	8:25p	GW	385	A	DTO	1
X127	7:55p	L	8:20p	GW	372	A	DTO	0
124	8:35p	L	9:10p	GW	398	A	DTO	1

(From CX 113 at 951, showing certificated carriers (here Hughes Airwest (RW)) listed above intrastate carriers (here Air California (OC)) and commuter air carriers (here Golden West (GW)).)

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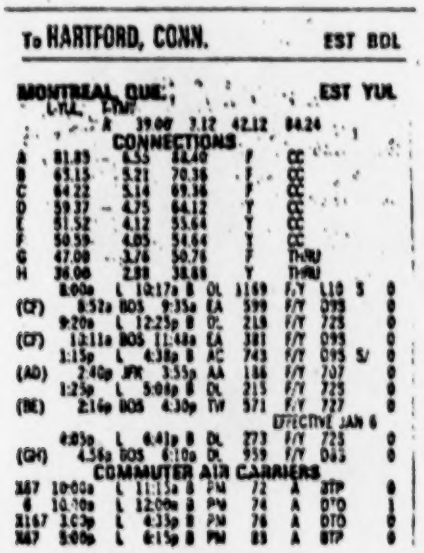
[6]*See* CX 113, pp. 1101–02 for letter symbols of airlines; CX 113, pp. 1107–11 for explanation of other abbreviations. (First 9 lines under "Los Angeles" in above schedule deal with fare information.)

22. Before December 1, 1976, respondent published in the OAG schedules for connecting flights for certificated carriers only. Connections on commuter carriers were not published in the OAG. (Complaint and Answer ¶13):



To HARTFORD, CONN. EST BOL

MONTREAL QUE. EST YUL

CONNECTIONS

A	81.89	6.55	88.40	F	CC
B	65.15	5.21	70.36	F	
C	64.22	5.14	69.36	F	
D	59.37	4.75	64.12	Y	
E	51.52	4.12	55.64	Y	
F	50.59	4.05	54.64	Y	
G	47.00	3.76	50.76	F	THRU
H	36.00	2.88	38.88	Y	THRU

	8:00a	L	10:17a	B	DL	1169	F/Y	L10	3 0
(CF)	8:52a	BOS	9:35a	EA		599	F/Y	095	0
	9:20a	L	12:25p	B	DL	218	F/Y	725	0
(CF)	12:11a	BOS	11:48a	EA		381	F/Y	095	0
	1:15p	L	4:38p	B	AC	743	F/Y	095	SV 0
(AD)	2:40p	JFK	3:55p	AA		186	F/Y	707	0
	1:23p	L	5:08p	B	DL	215	F/Y	725	0
(BE)	2:16p	BOS	4:30p	TW		571	F/Y	727	0

EFFECTIVE JAN 6

	4:03p	L	6:41p	B	DL	273	F/Y	725	0
(GH)	4:36p	BOS	6:10p	DL		959	F/Y	093	0

COMMUTER AIR CARRIERS

X87	10:00a	L	11:13a	B	PM	72	A	BTP	0
8	10:30a	L	12:09p	B	PM	74	A	DTO	1
2167	1:03p	L	4:35p	B	PM	76	A	DTO	0
X87	5:00p	L	6:15p	B	PM	83	A	BTP	0

(From CX 113 at 401, showing connecting flight listings for certificated carriers placed before direct flight listings of commuter air carriers (here Pilgrim (PM).)

23. On December 1, 1976, respondent began publishing two additional categories of service, commuter air carrier connections and intrastate air carrier connections, and changed the order of display. (Complaint and Answer ¶13; RX 214; Woodward 4189)

24. On December 1, 1976, the display of categories and service in the OAG was changed to the following order:

Certificated Air Carrier direct flights (published with no heading).

Commuter Air Carrier direct flights (published under the heading "Commuter Air Carriers")

Intrastate Air Carrier direct flights (published under the heading "Intra-State Air Carriers").

Certificated Air Carrier connections (published under the heading "Connections")

Connections involving Commuter Air Carriers or Commuter Air Carriers/Certificated Air Carriers (published under the heading "Commuter Air Carrier Connections").

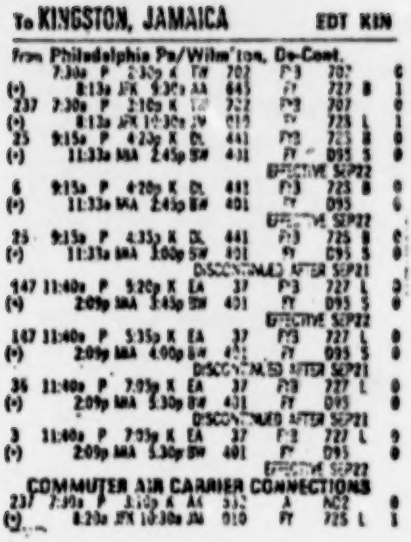
Connections involving Intrastate Air Carriers or Intrastate/Certificated Air Carriers or Intrastate/Commuter Air Carriers (published under the heading "Intra-State Air Carrier Connections").

(RX 214; RX 258)

Foreign Air Carriers

25. Though they hold no CAB certificate, foreign air carriers have their schedules chronologically merged in the certificated air carrier columns in the OAG. (Complaint and Answer ¶¶5, 12; Ceresa 987, 988, 1000, 1004)

26. Connecting flight information for foreign air carriers was in the OAG even before December 1976 (CX 174) and is included with certificated air carrier connections:



To KINGSTON, JAMAICA EDT KIN

From Philadelphia Pa/Wilm'ton, De-Cont.

	7:30a	P	3:35p	K	TW	702	F3	707		0
(•)	8:13a	JFK	9:30p	AA	665	FY	727	B	1
237	7:30a	P	3:10p	K	[illegible]	702	F3	707		0
(•)	8:13a	JFK	10:30p	JM	010	FY	725	L	1
25	9:15a	P	4:20p	K	DL	441	F3	725	B	0
(•)	11:33a	MIA	2:45p	BW	431	FY	D95	S	0
						EFFECTIVE SEP22				
6	9:15a	P	4:20p	K	DL	441	F3	725	B	0
(•)	11:33a	MIA	2:45p	BW	401	FY	D95		0
						EFFECTIVE SEP22				
25	9:15a	P	4:35p	K	DL	441	F3	725	B	0
(•)	11:33a	MIA	2:00p	BW	431	FY	D95	S	0
						DISCONTINUED AFTER SEP21				
147	11:40a	P	5:20p	K	EA	37	F3	727	L	0
(•)	2:09p	MIA	5:45p	BW	431	FY	D95	S	0
						EFFECTIVE SEP22				
147	11:40a	P	5:35p	K	EA	37	F3	727	L	0
(•)	2:09p	MIA	4:00p	BW	431	FY	D95	S	0
						DISCONTINUED AFTER SEP21				
36	11:40a	P	7:05p	K	EA	37	F3	727	L	0
(•)	2:09p	MIA	5:30p	BW	431	FY	D95		0
						DISCONTINUED AFTER SEP21				
3	11:40a	P	7:05p	K	EA	37	F3	727	L	0
(•)	2:09p	MIA	5:30p	BW	401	FY	D95		0
						EFFECTIVE SEP22				
					COMMUTER AIR CARRIER CONNECTIONS					
237	7:30a	P	3:10p	K	AA	332	A	NC2		0
(•)	8:13a	JFK	10:30a	JM	010	FY	725	L		1

(From RX 258 at 536, showing foreign carrier (BW) listed with certificated connections.)

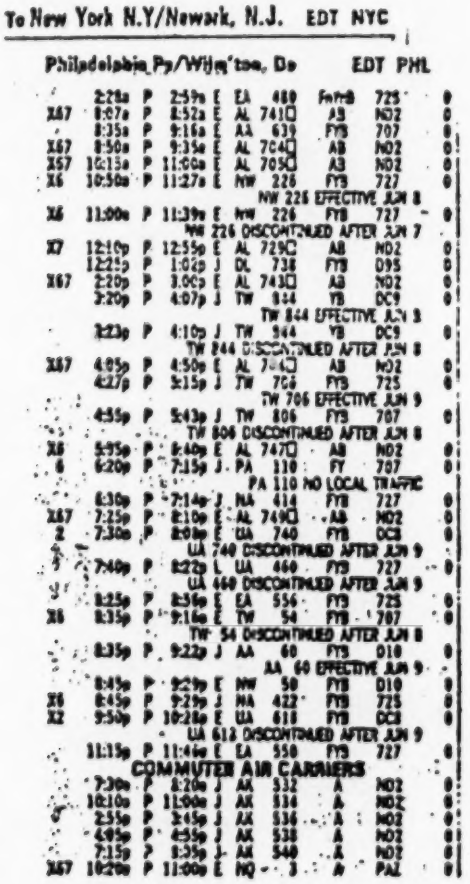
27. Of the 118 air carriers now listed by the OAG as certificated, 79 are foreign air carriers. (RX 517 at 1498)

Replacement Carriers

28. In 1967, the CAB approved a contract between Allegheny Airlines (a certificated carrier) and an air taxi operator pursuant to which the air taxi operator provided service over routes which were certificated to Allegheny. (RPF 68) This arrangement (known as "Replacement Flights") permits Allegheny to maintain its route authority and provide service to smaller communities with small aircraft at much lower cost than would be incurred using Allegheny's larger aircraft. (Howard 2727–29, 2735–36) At present, Allegheny has CAB-approved contracts with twelve commuter air carriers ("Allegheny commuters") pursuant to which such commuter air carriers provide service on behalf of Allegheny to some 27 communities. (Howard 2714, 2727)

29. Allegheny commuters' schedules in the OAG have been since 1967 and still are merged chronologically with certificated air carrier direct flights and certificated air carrier connecting flights. (CX 190; Nelson 3414) Prior to December 1, 1976, Allegheny commuters' connecting flight information was in the OAG. (CX 174)

30. Since September 1, 1969, the flight schedules for Allegheny Commuters, both direct and connecting, have been chronologically merged in the certificated air carrier columns in the OAG with a symbol in the shape of a square following the flight number (CX 174 at 3; RX 130; RX 131, RX 132):



To New York N.Y./Newark, N.J. EDT NYC

Philadelphia Pa/Wilm'ton, De EDT PHL

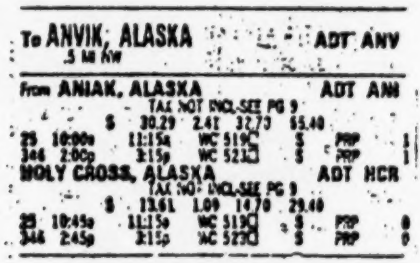
	2:28a	P	2:59a	E	EA	488	FYTB	725		0
X67	8:07a	P	8:52a	E	AL	741□	AB	NO2		0
	8:35a	P	9:16a	E	AA	639	FYB	707		0
X67	8:50a	P	9:35a	E	AL	764□	AB	NO2		0
X57	10:15a	P	11:00a	E	AL	705□	AB	NO2		0
X6	10:50a	P	11:27a	E	NW	226	FYB	727		0
					NW 226 EFFECTIVE JUN 8					
X6	11:00a	P	11:39a	E	NW	226	FYB	727		0
					NW 226 DISCONTINUED AFTER JUN 7					
X7	12:10p	P	12:55p	E	AL	729□	AB	NO2		0
	12:25p	P	1:02p	J	DL	738	FYB	D95		0
X67	2:20p	P	3:06p	E	AL	743□	AB	NO2		0
	3:20p	P	4:07p	J	TW	844	YB	DC9		0
					TW 844 EFFECTIVE JUN 8					
	3:23p	P	4:10p	J	TW	844	YB	DC9		0
					TW 844 DISCONTINUED AFTER JUN 8					
X67	4:05p	P	4:50p	E	AL	744□	AB	NO2		0
	4:27p	P	5:15p	J	TW	706	FYB	725		0
					TW 706 EFFECTIVE JUN 9					
	4:35p	P	5:43p	J	TW	806	FYB	707		0
					TW 806 DISCONTINUED AFTER JUN 8					
X6	5:55p	P	6:40p	E	AL	747□	AB	NO2		0
6	6:20p	P	7:15p	J	PA	110	FY	707		0
					PA 110 NO LOCAL TRAFFIC					
	6:30p	P	7:14p	J	NA	414	FYB	727		0
X67	7:25p	P	8:10p	E	AL	749□	AB	NO2		0
2	7:30p	P	8:00p	E	UA	740	FYB	DC8		0
					UA 740 DISCONTINUED AFTER JUN 9					
2	7:40p	P	8:22p	L	UA	460	FYB	727		0
					UA 460 DISCONTINUED AFTER JUN 9					
	8:25p	P	8:56p	E	EA	556	FYB	725		0
X6	8:35p	P	9:16a	E	TW	54	FYB	707		0
					TW 54 DISCONTINUED AFTER JUN 8					
	8:35p	P	9:22p	J	AA	60	FYB	D10		0
					AA 60 EFFECTIVE JUN 9					
	8:45p	P	9:29p	E	NW	50	FYB	D10		0
X6	8:45p	P	9:29p	J	NA	422	FYB	725		0
X2	9:50p	P	10:28p	E	UA	618	FYB	DC8		0
					UA 618 DISCONTINUED AFTER JUN 9					
	11:15p	P	11:46a	E	EA	550	FYB	727		0
					COMMUTER AIR CARRIERS					
	7:30a	P	8:20a	J	AX	532	A	NO2		0
	10:10a	P	11:00a	J	AX	534	A	NO2		0
	2:55p	P	3:45p	J	AX	536	A	NO2		0
	4:55p	P	5:55p	J	AX	538	A	NO2		0
	7:15p	P	8:25p	J	AX	540	A	NO2		0
X67	10:20a	P	11:00a	E	NO	3	A	PAL		0

(From CX 112 at 1109.)

In the "Abbreviations and Reference Marks" section of the OAG, the symbol is defined as follows:

> [Symbol] Following Flight Number Indicates A Replacement Flight Operated By A Commuter Air Carrier On Behalf Of A Certificated Air Carrier Pursuant To A CAB Approved Agreement. (RX 571 at 4)

31. In addition to the Allegheny commuters, 30 commuter air carriers operate replacement flights for certificated carriers Alaska Airlines and Wien Air Alaska, Inc. and receive the same display treatment as Allegheny Commuters in the OAG. (Nelson 3462)[7]


To ANVIK, ALASKA — ADT ANV

From ANIAK, ALASKA — ADT ANI

TAX NOT INCL-SEE PG 9

25 10:00a 11:15a WC 519C $ PRP

344 2:00p 3:15p WC 523C $ PRP

HOLY CROSS, ALASKA — ADT HCR

TAX NOT INCL-SEE PG 9

$ 13.61 1.09 14.70 29.40

25 10:45a 11:15a WC 519C $ PRP

344 2:45p 3:15p WC 523C $ PRP

(From RX 258 at 85, showing commuter replacement flights for Wien Air Alaska.)

32. About 700 of the 50,000 direct flights listed in a recent issue of the OAG were replacement flights operated by commuter air carriers but listed in the certificated air carrier category. (Nelson 2521)

33. Certificated airlines are obligated to serve smaller communities pursuant to a CAB route authorization even though they do so at a loss. In that event, the CAB may authorize payment to the certificated carrier of a subsidy. Since 1954, such subsidy payments have amounted to well over $1 billion. (CX 107, p. 7 n.1)

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[7] Not all commuter carriers operating replacement service for other certificated carriers receive "Allegheny treatment." (RX 135A; Nelson 3466; Britt 2545)

34. Replacement service allows the certificated carriers to fulfill their obligation by delegating the route to a commuter carrier. These replacement carriers, with their more fuel efficient airplanes, serve these smaller communities at a profit. (CX 106 at 16, 76) They cannot receive a federal subsidy. (CX 107 pp. 9–13) In 1975, there were 27 commuter carriers operating replacement service for 11 certificated carriers. (CX 107 p. 10)

Relevant Market

35. Respondent advertises that the OAG is the "standard reference of the Air Traffic Conference of America."[8] (CX 113, front cover) The OAG is the only complete listing of scheduled flights in North America. (CX 203B(1); CX 204A(1); CX 113 leaf between 2–3) The OAG is the primary source of flight schedule information to the flying public and the primary marketing tool for carriers. (May 565; Fugere 220) It is referred to in the airline industry as the "Bible." (Kyzar 1575; Griffin 851; CX 28B)

36. In addition to the OAG, there are four competitive sources of information about scheduled passenger air transportation. These four sources are the ABC World Airways Guide ("ABC"); computerized schedule information; individual airlines' printed schedules; and radio, television and newspaper advertising. The record reveals that none of these sources offer a real alternative. (McKenna 904; Kyzar 1612; Muse 812) When asked if he could name any actual competitors of the OAG other than ABC, the former Executive Vice President of the OAG testified that there were no significant competitors. (Reich 1299)

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[8]The Air Traffic Conference of America is the trade association of certificated air carriers. (CX 203 (54); CX 204 (54))

37. The ABC is a listing of scheduled flights much in the same format as the OAG but is directed toward international travel. (CX 202B-C; Fugere 238)

38. In 1973 ABC had a total circulation of 1,792 in the United States and Canada while in that same year the OAG had a total circulation of 137,796 in the United States and Canada. (CX 45A)

39. A witness with 14 years experience in the airline industry had only seen one copy of ABC in his life. (May 567) Another representative of a certificated air carrier testified he had never seen a single copy while employed by that carrier. (Mueller 1525) Some air carrier witnesses had never heard of ABC. (Muse 814; Britt 2597)

40. The ABC does not compete with the OAG in providing domestic flight information. (May 567; Jaques 656, 660; McKenna 904; Fink 1410; Mueller 1525; Budzic 3093; Davidoff 3178; Howe 1868; Reich 1295, 1300; CX 202C)

41. SCIP is the acronym for Schedule Change Input Package. (Lobach 4125) SCIP tapes are computer tapes upon which airline schedule information has been coded. When the information on the SCIP tapes is called for by the operator of the computer terminal it is electronically displayed on a cathode ray tube ("CRT"). (Whiteside 454; McKenna 904)

42. While many scheduled air carriers have access to SCIP tape capabilities, only a very small percentage of travel agencies and corporate travel offices use SCIP tapes. (May 568; McKenna 905-06; Ceresa 1012; Reich 1301-02; Davidoff 3153, 3154; Lobach 4219) SCIP tapes are not a marketing substitute for the OAG. (Autry 714; Griffin 854; Ceresa 1012)

43. The cost of a CRT for an office that does about three million dollars a year in business would be about fifteen thousand dollars a year. (Jaques 657) The cost

of subscribing to the OAG is currently $98.44 annually. (RX 571, advertising leaf between pp. 2-3)

44. The use of computerized schedule displays has not changed the growth rate of the OAG. (Lobach 4231; Reich 1208)

45. Even those airlines, travel agents and corporate travel offices that do have computer scheduling capability also subscribe to the OAG. (Kyzar 1613; Budzic 3094)

46. The limited use of CRTs is due in part to the fact that SCIP tapes contain less flight schedule information than the OAG. (Budzic 3085; Lobach 4125; Fink 1428)

47. Most scheduled air carriers print their own individual flight schedules which they furnish to their passengers. These schedules contain only the carriers' own flights. (Fugere 237; McKenna 903; Ceresa 1011-12) The schedules usually have only local or limited distribution. (May 566; Whiteside 432; Autry 710; Muse 814; McKenna 903; Britt 2598)

48. Individual timetables are also expensive. One witness testified that it cost his company approximately $.50 per schedule. (Muse 840)

49. Airlines, travel agents and corporate travel offices do not normally use individual flight schedules to obtain flight information and book flights. (Jaques 660; Fink 1415, 1416; Fugere, 237; Autry 710; Griffin 852; Ceresa 1011-12; Davidoff 3154)

50. Scheduled air carriers sometimes use radio, television and newspapers to advertise their flights. In some instances those advertisements contain limited flight schedule information. Where flight schedule information is advertised, it is only shown for the individual carrier and even then it is limited to a few city pairs. Commuter carriers cannot afford to advertise

nationally. (Fugere 236–37; Whiteside 433; May 566; Autry 710; McKenna 904)

51. Airlines, travel agents and corporate travel departments do not rely on radio, television or newspaper advertisements to obtain flight information and book flights. (Jaques 659; Fugere 237; Autry 710; Griffin 852; Davidoff 3154)

Conspiracy

52. The Airline Guides Committee is a committee of the Air Traffic Conference of America ("ATC"), a division of the Air Transport Association of America, ("ATA") the trade association of certificated airlines. (CX 203(43); CX 204(43); CX 89A) At Airline Guides Committee meetings, each certificated carrier was entitled to send one authorized representative and each representative had one vote. (Mueller 1497) The only persons entitled to vote at Airline Guides Committee meetings were authorized representatives of certificated air carriers. (Mueller 1500)

53. On September 10, 1971, OAG staff sent a telegram to the ATC. The OAG stated that at the next meeting of the Airline Guides Committee the: "OAG would like to discuss the merger of Certificated, Commuter and Intrastate Air Carrier schedules. OAG thoughts will be presented October 7. We would appreciate carriers coming to the meeting prepared to discuss their respective management opinions." (CX 14)

54. On September 13, 1971, the ATC sent out to all members of the Committee the agenda of the meeting of the Airline Guides Committee to be held October 7, 1971. (CX 89)

55. Item 7 on the agenda, "Merger of Schedules," was proposed by Mr. Howe, the Publication Manager of the OAG, with the approval of Robert Parrish, the

Publisher of the OAG. (Howe 1912–13; Reich 4218; Woodward 4216; CX 14; CX 89C)

56. Item 7 on the agenda of that meeting reads:

> OAG Staff has suggested that the Airline Guides Committee consider the merger of Certificated, Commuter and Intrastate carriers schedules in the guide publications. Direct flight listings would be listed together chronologically as currently shown. Additionally, Commuter and Intrastate carriers would have the opportunity to purchase online connections and Commuters would purchase connections with Certificated carriers and visa-versa. Only two categories of listings, direct and connections, would be required instead of the present four. OAG plans to provide further details at the meeting. Members, however, should be prepared to discuss their respective management opinions. (CX 89C)

57. Members of the committee did seek management opinions. (CX 102)

58. The meeting took place on October 7, 1971, at the Mayflower Hotel in Washington, D.C. (CX 89)

59. Item 7 was discussed during that meeting. (Howe 1698; Mueller 1501–02) Representatives of the OAG were present during the discussion. (Mueller 1508; CX 9A–1)

60. The official minutes of the meeting, published by the ATC and distributed to all certificated carrier members and to the OAG, state that "During discussion [of Item 7] it became obvious that there was no support for the proposal, therefore, no further action was required." (CX 9H)

61. Notes of the meeting taken by Mr. Howe, the Publications Manager of the OAG, state that: "the carriers were with the exception of [American and Na-

tional Airlines] against the merger of schedule listings." (CX 10D) He also stated that "[m]ost carriers felt that noncertificated carriers could be included in connections, though, this, of course, would weaken our argument against keeping them out of [merged] schedule listings." (CX 10D)

62. Mr. Howe's notes also state that one certificated carrier was concerned at the meeting that "noncertificated carrier[s] had no restrictions on routes and therefore could parallel the [routes of] certificated carriers at will." (Howe 1769; CX 19C)

63. At the October 7, 1971 meeting the certificated carriers voted not to change the OAG's method of separate, descending listings of the schedules for certificated commuter and intrastate carriers. (Howe 1872; CX 89C; CX 66A; Mueller 1502, 1508)

64. In 1975 of the 118 commuter carriers publishing schedules in the OAG, 78 purchased 408 subscriptions to the OAG. The remaining 40 may have purchased some additional subscriptions under individual rather than corporate names. (CX 135A) During that year certificated air carriers purchased over 30,000 subscriptions to the OAG, (CX 30)

65. Certificated air carriers are substantial customers of Donnelley products and services including subscriptions to the OAG and other publications, paid connections, and SCIP tapes. (e.g. CX 82B; CX 71) In 1975, seven certificated carriers paid Donnelley well over $3 million. (CX 71D; CX 73C; CX 77C; CX 80B; CX 82B)[9]

66. Some certificated carriers attempt to use their

[9] This figure does not include several of the larger air carriers such as American, Eastern, and Pan American, as well as other certificated carriers, who refused to supply this information, nor does it include substantial amounts paid by other certificated carriers. (CX 70; CX 74; CX 75; CX 78B; CX 81B; CX 90; CX 91)

position as large customers to influence respondent's publishing policies. (CX 118; CX 87)

Competition

Commuters

67. On April 15, 1975, there were 432 city pairs served by direct flights of both commuter and certificated air carriers. (CX 135E; CX 203(5))

68. In the year ending June 30, 1974, commuter air carriers served 514 city-pair markets in which passengers totaled 1,000 or more. Eighty-two of those markets were also served by certificated carriers. In those 82 markets, commuters accounted for 872,300 passengers and the certificated carriers 4,053,760. The commuter share was 17.7%. The 872,300 passengers represented 19.6% of the 4,440,762 commuter passengers in 48 states that year. (CX 62B)

69. In that year there were 19 markets in which commuters had 10,000 or more passengers in competition with certificated carriers. (CX 62C)

70. In that same year there were 25 markets in which certificated carriers had 50,000 or more passengers in competition with commuter carriers. (CX 62C)

71. Certificated carriers generally operate large jet aircraft carrying 100 or more passengers and flying at more than 500 miles per hour. Commuter carriers typically operate two-engine, propeller-driven aircraft seating no more than 30 passengers ("commuter aircraft") such as the Beech-99 (15 passengers, 280 mph), Cessna 402 (10 passengers, 239 mph), Douglas DC-3 (28 passengers, 193 mph), DeHavilland DHC-6 Twin Otter (20 passenger, 209 mph), Piper PA-31 (8 passengers 270 mph), Britten-Norman Islander (10 passengers, 260 mph), DeHavilland Heron (four engine, 17 passengers, 195 mph), and Nord 262 (27 passengers, 240 mph). (RX 571, p. 30; RX 225-F) Here are pictures of commuter aircraft (CX 106 at 2, 38):

Look at the record: commuter airlines fly more Beechcraft Airliners than any other.

Around the world, the busiest commuter airliners are the airliners built by Beech.

It's easy to see why, when you check the specs of the Beechcraft B99...the latest in the series. 283 mph cruise and an 832 mile range. A useful load of 5,100 lbs. Standard interior seats 15 passengers and a crew of 2. On a 2,200 hours-per-year utilization schedule, the direct cost-per-seat-mile is only 3.3 cents.

The Beechcraft B99 is a versatile workhorse performing a variety of missions for many different organizations. The operational flexibility possible with its outstanding combination of speed, range and payload makes it the most air transportation per dollar in its class.

For full information on the Beechcraft B99, write or call: J. M. Cook, Jr., Manager Airline Sales, Beech Aircraft Corporation, Wichita, Kansas 67201, (316) 689-7077.

Beechcraft Airliners fly with 49 organizations worldwide.

Aero Mech, Inc.
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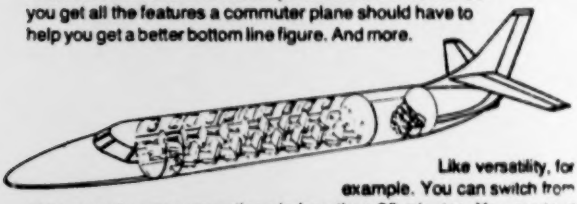
Cumberland Airlines
Cumberland, Md.
Cascade Airways
Spokane, Washington
Chautauqua Airlines
Jamestown, New York
Clark Aviation
Middletown, Pennsylvania
Colgan Airways Corp.
Manassas, Virginia
Command Airways, Inc.
Wappingers Falls, New York
Continental Oil Company Aviation
Houston, Texas
Fairways Corporation
Washington, D.C.
Freestate Aviation, Inc.
Gaithersburg, Md.
Henson Aviation
Hagerstown, Maryland
La Grande Air Service
La Grande, Oregon
Mesaba Aviation
Grand Rapids, Minnesota
MidState Air Commuter
Marshfield, Wisconsin
Mississippi Valley Airlines
LaCrosse, Wisconsin
Monmouth Airlines
Farmingdale, New Jersey
Perkiomen Airways
Reading, Pennsylvania
Pocono Airlines, Inc.
Avoca, Pennsylvania
Rio Airways
Killeen, Texas
Royale Airlines, Inc.
Shreveport, Louisiana
S M B State Line
Muskogee, Oklahoma
Scheduled Skyways, Inc.
Fayetteville, Arkansas
Skyline Aviation
Winchester, Virginia
Skystream Airlines, Inc.
Plymouth, Indiana
Skyway Aviation, Inc.
Ft. Leonard Wood, Missouri
Suburban Airlines
Reading, Pennsylvania
Upper Valley Aviation, Inc.
McAllen, Texas
U.S. Dept. of Agriculture
Atlanta, Georgia
Vacation Airways
Washington, D.C.
Air Alpes
Chambery/Aix-les-Bains, France
Air Cape
Cape Town, Cape Province
Republic of South Africa
Air Gaspe, Inc.
Douglastown, Quebec, Canada
Air Louwveld (Pty.) Limited
Johannesburg, South Africa
Air-Rouergue
Rodez-Marcillac, France
Atlantic General Airlines
St. Johns, New Brunswick, Canada
Baron Air A. B.
Malmo, Sweden
Brunei Shell Petroleum Co. Ltd.
Seria, State of Brunei, Borneo
Business Flight Service
Emmaboda, Sweden
C. Itoh & Company, Ltd.
Bangkok, Thailand
Ministerio de Defensa Nacional
Santiago, Chile
Superintendencia de Desenvolvimento da Amazonia
Belem, PA, Brazil
Touraine Air Transport
Tours, France

(CX 106 at 2)

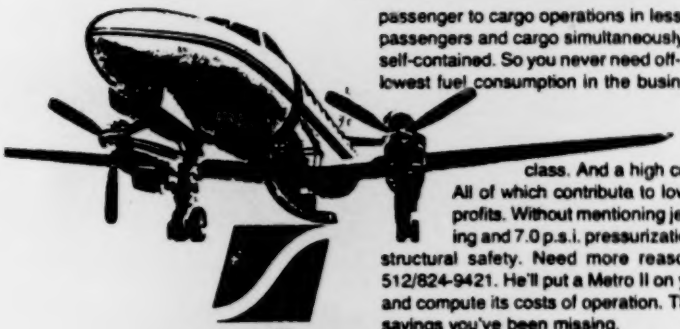
Your commuter service is programmed for profit.

METRO II is designed to help you increase it.

With the Metro II, you get an aircraft designed specifically as an airliner From scratch. Instead of a compromised older model. So you get all the features a commuter plane should have to help you get a better bottom line figure. And more.



Like versatility, for example. You can switch from passenger to cargo operations in less than 30 minutes. You can load passengers and cargo simultaneously. And the Metro II is completely self-contained. So you never need off-site equipment. You also get the lowest fuel consumption in the business. High utilization: over 3000 block hours yearly if you desire. The highest cabin volume. The greatest range in its class. And a high cruise speed of around 300 mph All of which contribute to lower operating costs. And higher profits. Without mentioning jet-age comforts like air conditioning and 7.0 p.s.i. pressurization. Or incomparable designed-in structural safety. Need more reasons? Give Earl Morton a call 512/824-9421. He'll put a Metro II on your route, figuratively speaking, and compute its costs of operation. Then you can see for yourself the savings you've been missing.



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Telex 767-315

(CX 106 at 38)

72. Some commuter carriers operate, pursuant to CAB authorization, four engine, pressurized, turboprop aircraft capable of carrying 50 passengers. (RX 571, at 30, 373; CX 107; at 46–47; CX 106 at 90–91)

73. Foreign air carriers listed as certificated air carriers in the OAG often fly "commuter aircraft" similar or inferior to the planes used by commuter carriers. (CSC Reply, at 57) Foreign air carriers are not subject to FAA safety regulation. (Ceresa 1002–03)

74. Allegheny commuter carriers operate commuter aircraft. (Beech 99, DeHavilland Twin Otter, DeHavilland Heron and Nord 262—CX 182L; Shorts SD3-30—RX 571 at 1058, CX 106 at 56–57)

75. Certificated air carriers sometimes fly commuter aircraft. (Mueller, 1515, 1517; CX 12C; Lang 3129-30; CX 112 at 205, 713, 624, 1129) They also fly some larger propeller driven aircraft. (Autry 697, Griffin 848; RX 258 at 976, 977; CX 112 at 91, 93, 340, 752, 1129; Mueller 1517) New York Airways flies helicopters and is listed with the certificated carriers in the OAG. (CX 258 at 783)

76. The airplanes used by commuter carriers are sometimes equivalent, identical or even superior to those flown by carriers listed with certificated carriers in the OAG. (CPF 98-101; CX 106 pp. 89–91) Some commuter air carriers are starting to use jet or turbojet airplanes. (CX 106 at 8, 84; Autry 774–75)

77. Commuter air carriers normally fly short routes averaging about 75 miles. Local service certificated carriers average 182 miles and trunk certificated carriers average 578 miles. (CX 106 at 92; McKenna 952) Most certificated carriers, with their larger planes, offer amenities (*e.g.*, food service, lavatories) not offered by commuter carriers. (RPF 184) In short flights, those amenities are not as important to pas-

sengers as the time schedule of the flight and the kind of airplane. (Jaques 669, 684; Autry 707)

78. To many people, especially those on business trips, the time a flight leaves and arrives is the most important consideration. (Fugere 320; McKenna 958; Griffin 850–51; Jaques 660, 686; Nelson, 3472) Passengers can sometimes save time by using commuter connections rather than certificated connections. (CPF 95; May 577)

79. Of 665 airports in the country, 256 are served solely by certificated carriers, 210 solely by commuters and 199 jointly by both classes of carriers. (CX 107 at 34) Commuter facilities at airports are often not as good as those for certificated carriers. (CX 20F; CX 107 at 53–55) Some commuters share terminal space with certificated carriers. (CX 106 at 37, 74–75, 83) Commuter carriers sometimes use more favorably located airports than competing certificated carriers. (CPF 96; Autry 702; Dzendolet 2629)

80. The number of commuter carriers has been increasing. In 1960 there were five in the OAG, 1966-36, 1967-50, 1968-75, 1969-110, 1974-140, 1976-163. (CX 106 at 5)

81. Passengers carried by commuters increased from about 4 million in 1969 to over 7 million in 1975. (CX 106 at 3; RX 328D; RX 344Z22)

82. Since at least 1971, all certificated carriers have had interline agreements with most commuter carriers. These agreements provide for joint fares (at a discount), and through ticketing and luggage handling arrangements. (CX 106 at 62–75; CX 12B; CX 22B; CX 20D) Many commuters now share the computerized reservation systems of major airlines. (CX 106 at 68, 94; CX 20D)

83. Pilgrim, a commuter air carrier, competes with Delta, Eastern, United, TWA, Allegheny and Ameri-

can, all certificated air carriers, as well as an "Allegheny commuter" which is integrated with certificated carriers in the OAG. (Fugere 215–16, 240, 287; CX 112 at 5)

84. Royale, a commuter air carrier, competes with Texas International, Delta Airlines, Southern and Braniff, all certificated air carriers. (May 554; CX 112 at 5)

85. Prinair, a commuter air carrier, competes with Eastern, a certificated carrier. (Ceresa 976, 1027; CX 112 at 5) Prinair competes as well as LIAT, ALM, Winair, Air BVI, Air France, Air Guadaloupe. (Ceresa 1000–01) These are all foreign air carriers which are integrated with certificated air carriers in the OAG. (CX 112 at 5; CPF 25)

86. Metro, a commuter air carrier, competes with Frontier Airlines, Texas International and Delta, all certificated air carriers. (McKenna 899, 902; CX 112 at 5)

87. Rocky Mountain, a commuter, competes with Aspen Airways, Frontier, Continental Airlines and Braniff, all certificated carriers. (Autry 693, 709; CX 112 at 5)

88. Allegheny, a certificated carrier competes with Altair, a commuter. (Howard 2855, 2857; CX 112 at 5) Altair also competes with "Allegheny commuters" which are treated as certificated carriers in the OAG. (Howard 2855; CPF 27)

89. Frontier, a certificated air carrier, competes with Rocky Mountain, Metro, Scheduled Skyways and other commuter carriers. (Mueller 1509, 1514; CX 112 at 5)

90. Texas International, a certificated air carrier, competes with commuters. (CX 41; CX 112 at 5)

91. Air New England, Inc., a certificated carrier, competes with commuter carriers. (CX 188B)

92. Commuter carriers competing with certificated carriers set their fares based on the fares charged by certificated carriers flying the same city pairs. (Fugere 379; Autry 695, 702; McKenna 901; May 562; Whiteside 411; Ceresa 1035) These certificated carriers also react to fares charged by the commuters. (Whiteside 411; Mueller 1510–11, 1514)

Intrastate

93. Intrastate and certificated carriers often have served the same city pairs. For example, Southwest Airlines, which was an intrastate air carrier, competed on all its city pairs (over 25) with certificated carriers. (Muse 809–12) Air Florida and Air California, which were intrastate carriers, also competed with certificated carriers in various city pairs. (Griffin 848–49; Davis 1439)

94. Intrastate carriers fly airplanes comparable to certificated carriers. (Muse 807; Griffin 847; Davis 1430; Cooke 3333)

95. Certificated carriers have lost market share in various city pair markets as a result of intrastate competition. (Muse 890; Cooke 3327)

96. Intrastate carriers compete with certificated carriers. (Nelson 3394, Cooke 3326–29)

97. Prior to November 9, 1977, intrastate carriers were prohibited from exchanging passengers and luggage with certificated air carriers. On that date, by statute, some such interlining was allowed. 49 U.S.C. 1371(d)(4). The Airline Deregulation Act of 1978, Pub. L. 95–504, 92 Stat. 1706 (eff. Oct. 24, 1978) provides that intrastate air carriers may now become, in effect, certificated carriers providing interstate transportation upon receiving CAB authorization. Four (Air California, Pacific Southwest Airlines, Southwest Airlines and Air Florida) have already done so and their

schedules will now be listed under certificated air carriers in the OAG. (RX 576) One air carrier in Illinois and three carriers in Alaska continue to operate as intrastate carriers. (RPF 328)

Safety

98. Regulations promulgated by the Federal Aviation Administration (FAA) govern the safe operation of aircraft with a gross weight of 12,500 pounds or less. (Schwind 3524) Most aircraft operated by commuter carriers are in this category. (Schwind 3573–74)

99. The FAA has different, more stringent, regulations governing the operation of the larger aircraft usually operated by certificated carriers and by most intrastate carriers. (RX 196P–R)

100. The certificated air carrier industry has a better safety record than the commuter air carrier industry. (RPF 203–08; 211–13) The largest 50 commuter air carriers, which carry about 90% of all commuter traffic, are statistically safer than the certificated air carriers. (Dzendolet 2666)

Reliability

101. Reliability of an air carrier measures whether it flies published schedules on time with listed equipment. The percentage of complaint letters received by the CAB regarding flights of certificated and commuter air carriers is about the same. (CX 135B) Commuters operated over 96% of flights scheduled in 1974, which is comparable with certificated carriers. (CX 107 p.5; CX 189B; McKenna 948–51) Certificated carriers and larger commuter carriers are more reliable than smaller, newer commuter carriers in performing flights at the scheduled time. (McKenna 920–21; Dzendolet 2642; Salfen 3272) Some commuters

have better reliability records than almost all certificated carriers. (CX 20B)

Injury

Connections

102. The OAG publishes certain connections free based on various time and frequency factors. If a carrier wishes to have a connection that does not qualify as a free connection published in the OAG, it must pay the OAG to list that connection. These connections are known as "paid connections." (Findings 14, 15) Prior to December 1, 1976, the OAG would not publish free or paid connections for commuter air carriers. (RX 214)

103. Paid connections cost approximately $2.30 per month per connection. (Whiteside 416) In 1975, Delta paid respondent over $160,000 to list paid connections in the OAG. (CX 69) TWA paid over $181,000 (CX 71); Braniff over $115,000 (CX 72); Allegheny over $280,000 (CX 73); Continental over $150,000 (CX 77); Northwest Airlines over $216,000 (CX 82B); and United Airlines over $300,000 (CX 80B; *see also* CX 23A(4); CX 70; CX 74; CX 75; CX 78; CX 81; CX 82; CX 91)

104. "Constructing a connection" refers to obtaining a connecting flight by using two direct flights listed in the OAG. "Constructing a connection" is difficult and time consuming. (Kyzar 1618; Ceresa 981–84; Fink 1353–58, 1371; Budzic 3107–08)

105. Before December 1, 1976, respondent refused to publish commuter air carrier connecting flight schedules in the OAG. (Complaint and Answer ¶ 13) At least as early as 1969 the OAG refused requests by commuter air carriers and their trade association to publish connections for commuter carriers. (Autry 715, 725; McKenna 907; CX 55; CX 58; CX 203(31), (32); CX 204(31), (32); RX 114A–B; CX 19A; RX 19J) In 1968

and again in 1969 one certificated airline requested that such connections be shown. (RX 1B; CX 171P; RX 102)

106. Where connections are not listed in the OAG there is little chance that the availability of such service will be known by those booking flights or by the traveling public. (CX 28B)

107. Commuter carriers were substantially injured by respondent's refusal to print commuter connections. (Fugere 223, 309–12; Whiteside 409–10, 416–17; May 571; Autry 716–18, 725–26; McKenna 908, 943; Ceresa 980, 990) Commuter carriers have a great need for connecting flight information to be published in the OAG since 70% of their passengers are to or from certificated carriers. (CX 12B; RPF 139; Whiteside 413) Respondent's failure to publish commuter connections also injured the traveling public. (CX 189C; CX 20E)

108. Commuters were injured by respondent's policy prior to December 1, 1976, of publishing connections for replacement carriers but not for commuters. (Fugere 248–49)

109. Commuters were injured by respondent's policy prior to December 1, 1976, of publishing connections for foreign carriers but not for commuters. (Ceresa 987–1002, 1013–14)

110. After the OAG started to print commuter connections, commuter carriers saw a substantial increase in connecting passengers. (Fugere 228–29; Autry 716; McKenna 908; Whiteside 416–17)

111. In 1971 respondent knew that this problem was "critical" to the commuters and that they were anxious to buy connections in the OAG. (CX 19A; CX 15A) In 1975, respondent's top official recognized "there are a number of very efficient and reliable commuter carriers to whom a disservice is being done" because of the

OAG's refusal to print commuter connections. (CX 201)

112. Donnelley has been publishing connections for certificated carriers in the OAG since it acquired the publication in 1962. (RX 573) After the Federal Trade Commission started the investigation which resulted in the complaint in this case being issued (RX114D; Reich 1273–74; Woodward 4170–71), Donnelley decided to publish connecting flight schedule listings for commuter and intrastate air carriers in October 1975. (Answer, Exhibit B) Donnelley announced this change on April 22, 1976, and started publishing connections for non-certificated carriers on December 1, 1976. (RX 214A; Lobach 4138)

Schedule Integration

113. About 1969, commuter and intrastate air carriers started requesting the OAG to integrate the schedules for all scheduled air carriers—to list the flights of all scheduled air carriers in chronological order for each city pair. (Autry 718; McKenna 908; Reich 1194–96)

114. Users of the OAG select the first acceptable flight listed in the OAG for the city pair. (McKenna 907) Even experienced users of the OAG read from the top of the page to the bottom and select the flight listed first ("first listing") (Ceresa 980; Lang 3135; Whiteside 406) The user of the OAG usually makes a choice of flight before ever reaching the commuter or intrastate categories. (Fugere 309–12; May 572; Muse 816; Griffin 851–52; Fink 1412) Airline sales personnel will book the first convenient flight in chronological order, even when that flight is not on their own airline. For this reason, some carriers have arranged to have their own custom schedules printed, showing their own flights first. (Fugere 352–54)

115. Being listed below certificated carriers in the OAG's flight listings results in an injury to commuter air carriers (Fugere 232-34; Whiteside 404-08; May 617-18; Autry 703, 716-18; 725; McKenna 943-47; Ceresa 980, 1032-34), intrastate carriers (Muse 823-25; Griffin 851), and to the traveling public. (Autry 702-03; Fugere 349-51)

116. The OAG lists certificated air carriers within any city pair in order of their time of departure. Where two flights leave at exactly the same time, the one that arrives first is listed first in the OAG. Prior to 1971, the carriers were listed alphabetically when flights had identical departure and arrival times. Thus, if an American Airlines flight and an United Airlines flight had identical departure and arrival times, the American Airlines flight would have been listed before that of the United Airlines flight. (CX 89B)

117. Because of complaints received from certificated air carriers, respondent started to consider randomizing direct flight listings in the OAG. For example, where two or more certificated flights had identical departure and arrival times, one flight would be selected at random to be listed first rather than alphabetical listing. (CX 9H. CX 123B)

118. In an Airline Guide committee meeting in 1971, all carriers whose codes began with A-M opposed randomizing and all carriers except one whose codes began with N-Z favored randomizing. (Northwest was the exception. United is its main competitor.) All of the certificated carriers recognized the competitive advantage in being listed first. (CX 31-35; CX 88A-D; CX 98; Kyzar 1615) The publisher of the OAG also recognized this competitive advantage. (CX 36C)

119. In early 1972, respondent changed its policy and started randomizing direct flight listings where the flights left at about the same time (still keeping

separate categories for certificated, commuter and intrastate carriers). (CX 123) An IBM program was used to insure fairness in the random selection. (CX 123B) The OAG later similarly randomized connections. (CX 49G)

120. Allegheny insists on having Allegheny commuters listed with certificated carriers and not below with other commuters because first listing is a better marketing tool. (CX 128; Howard 2812–13)

121. Prior to the randomization controversy, certificated carriers tried to achieve first listing by changing their flight time to leave one minute earlier than their competition in order to be listed first. (CX 34, CX 35, CX 36A, CX 88A, CX 98N–Q; CX 185)

122. The importance of first listing is also indicated by the fact that several air carriers have commissioned the OAG to publish custom guides for use by the airlines' own reservation agents. (CX 52Z; Lobach 4129–30) These custom guides follow the OAG format, but list the flights of that carrier ahead of the flights of competing carriers. (CX 153, 154)

123. The ABC World Airways Guide, the OAG's competitor outside the United States, randomizes flight listings as well as integrating the schedules of commuters, intrastate and certificated carriers. (CX 36A, CX 39B; CX 12C)

124. SCIP tapes integrate the schedules of commuters and certificated carriers. (Fugere 277, 387; CX 11B)

125. The OAG international edition integrates flight schedules of foreign commuter airlines with those of foreign certificated airlines. (CX 12A)

DISCUSSION

The following discussion summarizes and supplements the findings of fact and presents conclusions of law.

Introduction

Scheduled passenger air transportation in this country is conducted primarily by air carriers holding certificates of public convenience and necessity from the Civil Aeronautics Board. "Trunk" certificated carriers usually fly between large cities and average almost 600 miles a trip. "Local service" certificated carriers usually fly between smaller cities and between small and large cities and average about 200 miles a trip. (Finding 77) These certificated carriers usually fly large jets carrying 100 or more passengers.

In the last two decades commuter air carriers have become increasingly important in passenger air transportation. These carriers are not certificated by the CAB and they pick their own routes and set their own fares. They generally fly between small communities and between those towns and larger airports connecting with certificated carriers. Generally they fly smaller planes,[10] and average about 75 miles per trip. (Finding 77)

The number of commuters has increased from 36 in 1966 to 163 in 1976. (Finding 80) They carried over 7 million passengers in 1975. (Finding 81)

Because commuters can choose to enter or leave markets without CAB authorization, some of them have entered some heavy traffic markets in competi-

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[10] The Airline Deregulation act of 1978 increased the maximum size of commuter planes to those having a capacity of less than fifty-six passengers. 49 U.S.C. 1371, 92 Stat. 1732 (Oct. 24, 1978).

tion with certificated air carriers. (Finding 68–70, 83–91) About 20% of the passengers in these markets are carried by commuters. (Finding 68)

Commuters have been successful in the "feeder" role of carrying passengers to and from larger airports where they can connect with certificated carriers. They do this so well that eleven local service certificated carriers have withdrawn from these routes, with CAB authorization, by entering into "replacement agreements," whereby the commuter carriers take over the route. Even though the local service carrier may have been losing money on these city pairs, and often was receiving a federal subsidy, the commuters, with their fuel efficient planes, can usually perform this service at a profit.[11] In 1975 there were 27 commuter carriers operating replacement service for 11 certificated carriers. (Finding 34)

Commuter air carriers are now an important part of the scheduled passenger air transportation industry.

Respondent publishes the Official Airline Guide. The OAG is the only complete list of scheduled airline flights in North America. (Finding 35)[12] It is the size of the Washington D.C. "Yellow Pages" telephone book and it comes out monthly, with a mid-month supplement. It costs about $100 a year and is used by ticket agents for airlines, travel agents, and scheduling personnel for corporations. While there are other specialized sources of flight information, there is no substitute for the OAG. (Finding 36)

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[11] Texas International, a certificated air carrier, charged a fare of $21 between College Station, Texas, and Dallas, and lost $41 per passenger. Davis Airlines, a commuter, charged $20 and made a profit. (CX 107 p. 9; CX 174 p. 155)

[12] The OAG also provides information about fares, equipment, airports, meals, stops, and ground transportation. (RX 571)

The OAG is arranged alphabetically by the city the passenger is going to; under each such city the cities from which the passengers are coming are also listed in alphabetical order. The schedules are divided into direct flights (without changing planes) and connections (involving a change of planes). Until December 1, 1976, respondent did not publish connections for commuter air carriers. (Finding 22) As a direct result of the Federal Trade Commission investigation in this case, respondent started publishing commuter connections on December 1, 1976. (Finding 112)

The OAG city pair format is further divided into categories by class of carrier: certificated carriers, commuter carriers, and intrastate carriers. The schedules of certificated carriers have always come first. (Finding 20–24) The flights within each category are in chronological order. Users of the OAG choose a flight by reading the schedule from the top down and generally choose a flight before ever reaching the commuter or intrastate categories. (Finding 114)

Being close to the top of the schedule ("first listing") is competitively very important. For example, certificated air carriers, whose names placed them alphabetically below their competitors when both left at the same time, insisted that the listings be selected at random rather than alphabetically. (Findings 116–19)

Respondent's discriminatory policy has competitively injured commuter air carriers, especially respondent's refusal to publish connection since 70% of the commuters' passengers are connecting with other carriers. (Findings 106–10, 115)

Rather than the result of objective editorial decision, this policy has resulted from respondent's economic affiliation with the certificated carriers (Findings 64–66, 103) and from a conspiracy. At a meeting with OAG representatives on October 7, 1971, a com-

mittee of about twenty certificated carrier representatives voted to continue the OAG policy of separate carrier categories and of refusing to publish commuter and intrastate carrier connections. (Findings 52–63)

Respondent's main arguments for the discriminatory publishing policy have been that commuters were not reliable in flying according to their announced schedules and that they were not as safe as certificated carriers.[13] (Reich 1206) The record in this case shows that those arguments are baseless. (Findings 98–101) The only accurate relevant comparison of safety and reliability of air carriers can be made when they use similar airports and are flying over similar terrain in similar weather.[14]

Furthermore, respondent does indeed publish schedules for noncertificated carriers. To be consistent, then, respondent can only use the safety and reliability argument to show that the schedules of noncertificated carriers should be designated in some way. Respondent already designates replacement carriers such as the "Allegheny" commuters and publishes their schedules among the certificated carriers. (Findings 28–30) The same system could easily be used to designate noncertificated carriers.

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[13] Nothing in the record shows that intrastate carriers, which fly the same large jets as competing certificated carriers (Finding 94), are any less reliable than certificated carriers.

[14] (Dzendolet 2662–63.) The CAB qualifies its Schedule Arrival Performance publication for January 1979 with this statement:

> Since these data do not constitute a representative sample of any carrier's total flights or of the industry as a whole, they should not be used for intercarrier comparisons in any way except in individual markets. The results shown shall not be "extrapolated" to obtain a "system" average for any carrier.

Respondent fears that, if the schedules were merged, passengers would buy tickets on commuter flights without realizing that they would be flying on smaller aircraft. While this is possible in some cases, it is unlikely to happen frequently. Travel agents generally inform their customers whenever a smaller aircraft is involved in a flight. (RFP 242) Furthermore, this argument is not consistent with respondent's practice of publishing schedules of replacement and foreign carriers with certificated carriers,[15] even though those flights involve small aircraft. (Findings 28, 73)

But for the conspiracy found in this case, there is no good reason why respondent should not merge schedules in the OAG for certificated and noncertificated carriers. Respondent already does so in other publications. Respondent merges the schedules of similar carriers in the International edition of the OAG. In 1971 the Publisher of the OAG wrote (CX 12A-B):

> There is a question in our mind as to why we should continue separation of commuter air carriers in the United States when we actually merge the schedules of similar operations in our International OAG. Many of the small overseas carriers operate aircraft similar to those used by U.S. Commuters. Why penalize our own "small" airlines?

Another example of this inconsistent behavior exists. The 1978 Washington, D.C. commercial telephone directory ("Yellow Pages") contains a listing for "airline companies." The airline companies listed alphabetically thereunder include both certificated and commuter airlines. For example, American Airlines, Braniff International, Continental Airlines and Delta Air Lines are certificated airlines. (RX 571 p. 1498)

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[15] Some certificated carriers also fly small aircraft. (Finding 75)

Altair Airlines, Inc.,[16] Colgan Airways Corp., Commuter Airlines, Cumberland Airlines, and Pioneer Airlines, Inc. are commuter airlines. (RX 571 pp. 1499–1500) The publisher of the Yellow Pages is respondent Donnelley. (CX 24A)[17]

Other sellers of passenger air schedules also merge the certificated and noncertificated listings. The ABC World Airways Guide, the OAG's competitor outside of the United States, does so. (Finding 123) Computerized systems do so. (Finding 124) Respondent's reason for not merging the schedules was without doubt based on the conspiracy found herein, and not on the differences in the carriers they suggest.

The Meeting

In 1971 commuter air carriers were carrying over 4 million passengers, 70% of whom were connecting with certificated airlines. The OAG did not print commuter connections nor did it integrate their schedules with certificated airlines. Mr. Howe, the Publications Manager of the OAG, and Mr. Parrish, the Publisher, became convinced that this should cease and put their reasons in writing. (CX 11, CX 12, CX 15, CX 19) They found: that some certificated carriers wanted to

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[16] Altair became certificated in 1978 but at the time of the printing of the Yellow Pages it was a commuter. CX 258 p. 1221.

[17] Neither the Yellow Pages nor the CAB publication in footnote number 14 are in this record. While these documents at most are alternative evidence, *Safeway Stores, Inc.* v. *FTC*, 366 F.2d 795, 803 (9th Cir. 1966), *cert. denied* 386 U.S. 932, respondent will have the "opportunity to show to the contrary," 5 U.S.C. § 56 (e), in a motion for reconsideration or before the Commission which has the ultimate factfinding responsibility in this proceeding. Administrative agencies should not "ignore the realities of life and disregard common knowledge" in reaching their decisions. *Continental Can Co.* v. *United States*, 272 F.2d 312, 315 (2d Cir. 1959).

purchase connections to noncertificated carriers; that noncertificated carriers were anxious to purchase connections (which would result in increased OAG sales); that this was a "critical problem" for noncertificated carriers; that commuter carriers may be "far superior" to small foreign airlines which appear in OAG and other international air schedule publications; that changing the format to eliminate the separation of classes of carrier would save lines of copy and give the OAG a less confusing format; and that since foreign carriers, replacement carriers and some certificated carriers were flying small planes, "equipment is now a weak argument for continued separation." (CX 12C) The executives concluded that when the policy of separation of schedules was first established it was justified: "The scheduled Air Taxi or Commuter type of service was quite new, it was unregulated, at times it was unreliable, and there were many differences between the two services." (CX 12A) They stated that now however: "Over the intervening years these differences have been reduced in number and we are now convinced that in the interest of our subscribers and the future growth of the nation's air transportation system, these schedules should be merged as soon as it is feasible to do so." (*Ibid.*) The only reasons against the merger of the schedules noted by the executives were the "certificated carrier objection" and possible subscriber objections. (CX 11B)

They put the matter of merged schedules and commuter connections as "Item 7" on the agenda of the next meeting of the Airlines Guide Committee, for consideration by the certificated carriers. (Findings 52–56) The notice requested the representatives to seek management opinions of the subject. (Findings 56–57) The meeting took place on October 7, 1971 at the Mayflower Hotel in Washington, D.C. (Finding 58) Item 7 was the most important and primary subject

discussed at the meeting. (Howe 1691-92) Peter E. McKenna attended the meeting representing Texas International, a certificated carrier. Mr. McKenna testified as to his recollection of the meeting. (McKenna 910):[18]

> Q. And can you recall any specific conversation or statement by any representative of the Reuben Donnelley Corporation relating to the question of the integration of commuter schedules into the OAG and the listing of commuter connections in the OAG?
>
> A. Yes, I can. I recall a statement by Reuben Donnelley's Bob Parrish or Red Howe. I don't recall specifically who made the statement.
>
> The statement, I do recall, was in substance a statement to airline personnel—that they should determine—the airlines should determine whether they were going to do business with commuters or not.
>
> That on the one hand, airlines were entering ticketing and baggage agreements, joint fares, a variety of interline activities, while on the other hand, he was being told to keep commuters out of the book.

The representatives of the certificated air carriers discussed the matter. A symbol next to the flight number would have satisfied some carriers. (CX 19C) One carrier "was concerned in that the non-certificated carriers had no restrictions on routes and *therefore could parallel the certificated carriers at will*." (Finding 62;

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[18] From his demeanor on the stand, and based upon his whole testimony, I believe Mr. McKenna is a credible witness. While respondent produced other witnesses whose recollection was different as to this aspect of the meeting, I disbelieve those witnesses because of their bias, lack of recollection, or general appearance.

emphasis added.) The carriers voted. (Finding 63) Except for American and National Airlines, the carriers voted "against the merger of schedule listings." (Finding 61; CX 66A) They also agreed that to include commuter connections in the OAG would weaken their argument against merged schedules. (Finding 61)

After the Airline Guides Committee meeting, Mr. Howe and Mr. Parrish changed their minds about merging schedules and printing commuter connections. (Howe 1829–32) When the Airline Guides Committee was officially disbanded in 1973 because of allegations of conspiracy, the representatives of the certificated carriers agreed to continue to meet with the OAG in an unofficial capacity. (CX 67)

Conspiracy

Respondent has combined and conspired[19] with certificated air carriers to publish the schedules of the

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[19] The complaint and notice of contemplated relief herein involve, in part, allegations of an unlawful combination between respondent and certificated air carriers (see paragraphs 11, 15, and 18 of the complaint; paragraph 1(c) of the notice of contemplated relief; Tr. 49–53). The complaint does not contain the word "conspiracy." As used in the language of antitrust law, the terms "conspiracy" and "combination" are derived from the Sherman Act which, in part, prohibits every "contract, combination . . . or conspiracy in restraint of trade," 15 U.S.C. § 1. The gist of both terms is "whether or not there is a collaborative element present." *Pearl Brewing Co.* v. *Anheuser-Busch, Inc.*, 339 F. Supp. 945, 951 (S.D. Tex. 1972). It has been suggested that the terms are synonymous. *Id.* at 950 n. 1. Since there is a presumption against the use of redundant words in a statute, *FTC* v. *Retail Credit Co.*, 515 F .2d 988, 994 (D.C. Cir. 1975), the terms probably have slightly different meanings. It may be that an unlawful "combination" can be established by evidence falling somewhat short of that necessary to establish an unlawful "conspiracy." Oppenhein, Federal Antitrust Laws, p. 178 n. 1 (3rd Ed. 1968).

noncertificated carriers in the OAG in a discriminatory manner.

This conspiracy injured the noncertificated carriers and had the purpose and effect of a *per se* illegal group boycott. Two analogous cases make the point, *Klors, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), involved a vertical conspiracy among manufacturers, distributors and Broadway-Hale, a retailer of household appliances, whereby the sellers agreed not to sell to the retailer's competitor, Klors, or to sell to it only at discriminatory prices and unfavorable terms. (359 U.S. at 213) Broadway-Hale "used its 'monopolistic' buying power to bring about this situation." (359 U.S. at 209) The Court held the conspiracy to be a group boycott and *per se* illegal, and that such group boycotts have not been "saved by allegations that they were reasonable in the specific circumstances" because "such agreements no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." (359 U.S. at 212)

The commuter carriers here have received discriminatory treatment because of a conspiracy between their competitors, the certificated carriers, and respondent. In *Broadway-Hale*, Klors received discriminatory treatment as the result of a conspiracy between its competitor, Broadway-Hale, and the suppliers. Both show *per se* illegal group boycotts.

In *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); two Texas broker-dealers arranged with members of the New York Stock Exchange for direct-wire telephone connections used for trading securities over the counter. This private wire connection facilitated communication with other traders by providing instantaneous market information about the latest offers to buy and sell. The temporary approval was rescinded pursuant to the rules of the Exchange.

The Court held this to be a *per se* violation of the Sherman Act since it was a group boycott depriving petitioners of a valuable business service which they needed in order to compete effectively as broker-dealers in the over-the-counter securities market. The member firms remained willing to deal with the petitioners for the purchase and sale of securities, but the Court held that this did not excuse the collective decision to deny petitioners the private wire connections: "A valuable service germane to petitioners' business and important to their effective competition with others was withheld from them by collective action. That is enough to create a violation of the Sherman Act." (373 U.S. at 348–49 n. 5)

Respondent here provides the airline industry with the OAG. In *Silver*, the New York Stock Exchange provided the direct wire telephone connections. Commuter carriers can do business—though not as well—without fair treatment in the OAG's publication policy. In *Silver*, the Texas broker-dealers could conduct business without the direct wire service. The illegality springs from the collective denial of a valuable marketing tool.

Abuse of Economic Power

In addition to the unlawful combination, the complaint charges that the OAG is the only publication in the United States that has all of the passenger flight schedules of air carriers, and that respondent has abused its duty to treat in a nondiscriminatory manner all of those who rely on that service.

The complaint does not allege unlawful monopolization in the publication and sale of passenger flight schedules of domestic air carriers, nor does it allege unlawful effects on companies other than air carriers. No injury is alleged to potential or actual competitors

of respondent in the publication and sale of passenger flight schedules of domestic air carriers.[20] Instead, the theory of competitive injury is that respondent has misused the OAG to discriminate against noncertificated air carriers.

The classic misuse of economic power has the purpose and effect of injuring competition in the market in which the law violator is engaged.[21] Here, by contrast, the theory of the individual violation of Section 5 involves respondent's misuse (by discriminatory publishing policies) of economic power (the OAG) to the detriment of noncertificated air carriers—a market in which respondent does not compete.

The competitive injury of this theory, then, involves the use of economic power in one market with the effect of curtailing competition in another market. This theory has precedent. In *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357 (1965), the Court upheld a Commission order prohibiting a similar misuse of economic power. There, the oil company agreed to "sponsor" Goodyear tires, batteries and accessories ("TBA") to independent gasoline stations to which it sold gasoline. In return for this sponsorship the oil company was paid a commission on the TBA Goodyear sold to the gasoline station. Among the sources of "leverage" in Atlantic's hands, by which it influenced the buying decisions of the Atlantic gas station dealers, were its lease and equipment loan contracts with short term and cancellation provisions. (381 U.S. at 368) The TBA sold to the Atlantic gasoline stations was the market foreclosed by the arrangement. Atlantic used its economic power over the gas stations and injured competition in a market in which it did not compete. Simi-

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[20] Stipulation filed September 24, 1976.

[21] *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 377 (1973); *United States* v. *Griffith*, 334 U.S. 100, 109 (1948).

larly, here, respondent uses its economic power—control of the OAG—and injures competition in a market in which it does not compete—air passenger transporation.

La Peyre v. *FTC*, 366 F.2d 117 (5th Cir. 1966) is another analogous case, There the circuit court upheld a Commission order prohibiting, under Section 5, the leasing to shrimp canners of a patented shrimp peeling machine on a discriminatory basis. Respondents there were engaged in shrimp canning and leased the shrimp peeler to West Coast shrimp canners at twice the rate it charged Gulf Coast canners. The court upheld the finding that this was the use of monopoly power in one market (the patented shrimp peeler) resulting in discrimination and the curtailing of competition in another market (shrimp canning). (366 F.2d at 121)

Respondent here has also used its economic power in one market to discriminate and injure competition in another market.

Relevant Market

There was no dispute in this record that the geographic market is the United States. (Complaint ¶ 4; Answer ¶ 4) The parties vigorously contest, however, the relevant product market.

In *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962), the Court stated the relevant product market test under Section 7 of the Clayton Act:

> The outer boundaries of the product market are determined by the reasonable interchangeability of use or cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.

The Court then described the criteria to be applied in determining the existence of a submarket, *ibid*:

> The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

This test for submarket criteria may appropriately be used to define the relevant product market in a case under Section 5 involving abuse of economic power by control of a market. *Borden, Inc.*, Vol. 3 Trade Reg. Rep. ¶ 21,490, p. 21,498 (FTC Final Order, Nov. 7, 1978).

Respondent argued that there are four services available to users of the OAG which compete with it: (1) advertising—radio, television and newspaper, (2) individual airline schedules, (3) computerized schedule information, and (4) the ABC World Airline Guide.

Computerized schedule information comes the closest to competing with the OAG. This system involves a computer tape of schedule information and is used generally by one of the certificated airlines. The information is displayed at the counter of the ticket agent on a cathode ray tube. The tapes contain only the schedule information ordered by the airline and do not contain all of the flight schedule information available in the OAG. (Finding 46) The system is much more expensive than the OAG. (Finding 43) Only a small percentage of those needing access to flight schedule information have a computer system. (Finding 42) Even those who have a computer system still subscribe to the OAG. (Finding 45) The growing use of the CRTs by airline reservation agents has not di-

minished the growth of the sales of the OAG. (Finding 44)

The submarket analysis of *Brown Shoe* shows that the OAG is a distinct economic market. Neither computerized schedule information nor the other services are reasonable substitutes for the information published in the OAG.

1. Industry Recognition

Industry witnesses testified that they do not recognize as a substitute for the OAG advertising of flight schedules on the radio, television or print media (Finding 51), individual airline timetables (Findings 47, 49), computerized information (Finding 42), or the ABC World Airline Guide (Findings 39, 40). Even respondent's former Executive Vice President testified that there are no significant competitors of the OAG. (Finding 36) It is recognized in the airline industry as the primary marketing tool for air carriers and is referred to as the "Bible." (Finding 35)

2. Unique Characteristics

The OAG is the only complete listing of all scheduled flights in North America. Its cover proclaims that it is the "Standard Reference of the Air Traffic Conference of America," which is the trade association for certificated air carriers. (Finding 35) Advertising, individual airline timetables and computerized information do not have the massive detail available in the OAG. (Findings 45–47) The ABC World Airline Guide provides different information. (Finding 37) Where these services are used, they supplement the OAG, not substitute for it. (Findings 45, 51)

3. Price

There are substantial price differences between the OAG and the purported substitutes. Computerized information and individual timetables are vastly more

expensive. (Findings 43, 48) Commuter carriers cannot afford to advertise outside of the areas in which they fly. Advertising is not a financially viable alternative to the OAG. (Finding 50)

The OAG is also the relevant market using the traditional market definition of monopolization case law.

The ultimate objective of the market analysis is to deliniate a market which conforms to an area of effective competition and to the realities of competitive practices. *L.G. Balfour* v. *FTC*, 442 F.2d 1, 11 (7th Cir. 1971). A single product may be a relevant market. In *United States* v. *Grinnell Corp.*, 384 U.S. 563, 572–73 (1966) (*dicta*) the Court said that in monopolization cases under Section 2 of the Sherman Act, as in Section 7 cases under the Clayton Act, "there may be submarkets that are separate economic entities."[22]

Where, as here, a conspiracy is found, the relevant product market may be narrow indeed. *International Boxing Club of New York* v. *United States*, 358 U.S. 242 (1959) (championship boxing matches); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947) (the replacement market for taxicabs in four cities); *United States* v. *Pullman*, 50 F. Supp. 123 (E.D. Pa. 1943) (furnishing and servicing sleeping cars for railroads); *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733 (N.D. Ohio 1913) (tugboats in 14 of the 50 Great Lakes harbors). The market alternatives argument is irrelevant where, as here, there was a conspiracy to boycott. In *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 487 (1st Cir. 1952), the plaintiff wholesaler of fresh fruit and vegetables

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[22] Market delineation under Section 5 of the Federal Trade Commission Act may be even less formal than under the Sherman or Clayton Acts. *Cf. FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 320–22 (1966).

had been denied renewal of a lease in a building used as a market:

> Defendants contend . . . that a discriminatory policy in regard to the lessees in the Produce Building can never amount to monopoly because other alternative selling sites are available. The short answer to this is that a monopolized resource seldom lacks substitutes; alternatives will not excuse monopolization.

The OAG is a flight schedule information service for which there is no substitute. Respondent has conspired to discriminate in the publishing of information in the OAG to the detriment of noncertificated air carriers and the traveling public. The OAG is, therefore, the relevant product market in this case.

Intent

Respondent argues that its publishing policy was intended only to insure the "integrity" of the OAG, and that it separates the classes of air carriers to avoid misleading the public. In fact, however, respondent has a substantial financial incentive to follow the will of the certificated carriers. This economic incentive distinguishes respondent's intent from the altruistic intent exonerating collective action.

The classic rule is that proof of specific intent in a monopolization case is not always required. *United States* v. *Griffith*, 334 U.S. 100, 105 (1948); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 173 (1948). The use of economic power may not be unlawful, however, if it is for an altruistic purpose.[23] Re-

[23] Absence of anticompetitive motive may exonerate monopolistic or group conduct. *Joseph E. Seagram & Sons* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 80 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062. See also:

> *E.A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Committee*, 467 F.2d 178 (5th Cir. 1972), *cert. de-*

spondent's purpose therefore must be considered in deciding the individual conduct theory of the complaint.

Complaint counsel argue that "regardless of motive" it is the duty of a monopolist to conduct its business in such a way as to avoid inflicting competitive injury on a class of customers. (Brief p. 105) Complaint counsel cite for this proposition *La Peyre, supra.* There the Commission's majority opinion held that, by discriminatory leasing of the shrimp peeling machines, respondents were injuring their own competitors since

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nied, 409 U.S. 1109 (1973). (A committee of certificated air carriers refused to list McQuade's tours in its tour program manual. The court refused to apply the *per se* test of collective refusals to deal because those arrangements have the purpose or effect of excluding or coercing competitors and here none of the members of the committee were in competition with McQuade and there was no evidence to suggest that the committee "applied its standards to McQuade in a discriminatory fashion." (467 F.2d at 187–88)).

Bridge Corp. of America v. *America Contract Bridge League, Inc.* 428 F.2d 1365 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971). (Defendants' purpose was not to injure plaintiff but to protect the integrity of bridge tournaments.)

Deesen v. *The Professional Golfers' Ass'n.*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966) (PGA's standards needed to prevent tournaments from being bogged down by great numbers of players of inferior ability.)

Staff Research Associates, Inc. v. *Tribune Co.*, 346 F.2d 372 (7th Cir. 1965) (Newspaper refused to allow employment agencies to advertise under "help wanted" section of classified ads but allowed ads under "help wanted—employment services.")

America's Best Cinema Corp. v. *Fort Wayne Newspapers, Inc.*, 347 F. Supp. 328 (N.D. Ind. 1972), (Newspapers restricted X-rated movie ads to the name and telephone number of the theater.)

they also were engaged in shrimp canning. Commissioner Elman, in a separate opinion, stated that respondents were not discriminating in price to protect their interests as shrimp canners but rather to maximize their profits on the shrimp peeling machines. The Circuit Court held that under either finding[24] of motive respondents violated Section 5 (366 F.2d at 121). However, Commissioner Elman's theory of the motivation does not disregard intent as an element of a Section 5 violation. He specifically stated that respondents' conduct "substantially and *unjustifiably* injured competition in the shrimp canning industry." (65 FTC 799, 869 (1964) (Emphasis added.)) This reasoning leaves room for any altruistic purpose which might make a monopolist's conduct justifiable. *La Peyre* does not hold that motive is irrelevant to a Section 5 monopoly case.

As found herein, however, respondent conspired with the certificated carriers to discriminate against the noncertificated carriers, and even without an overt conspiracy respondent had a great economic incentive to please its largest customers whose cooperation makes possible the publishing of the OAG.[25] This motivation surely does not justify the unlawful acts by respondent.

Injury to Competition

Commuter airlines carry passengers in numerous city pairs also served by certificated carriers (Findings

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[24] The Circuit Court erred in stating that: "We need not resolve these contrary findings as to motive." The court was bound to accept the majority Commission finding of the Commission as to motive, if it was based on substantial evidence. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487–88 (1951).

[25] (Nelson 2461)

67–70). While they generally fly smaller planes (Finding 71), commuters in some markets fly equivalent or even superior planes to those used by certificated carriers or foreign and replacement carriers listed with certificated carriers in the OAG. (Findings 72–76)

Commuters competing with certificated carriers are sometimes able to win substantial market share by more frequent schedules. (Finding 78) For example, a commuter carried 92% of the 140,000 passengers flying between Los Angeles and Ontario, California in 1973 (CX 61E), by scheduling 30 daily flights while the certificated carriers had five. (CX 174 p. 335)

Commuter carriers flying city pairs served by certificated carriers set their fares based on the fares charged by certificated carriers flying the same city pairs. Those certificated carriers also react to fares charged by commuters. Such pricing decisions indicate competition. *United States* v. *duPont*, 351 U.S. 377, 400 (1956)

Intrastate carriers often serve the same city pairs as certificated carriers. (Finding 93) They fly the same type of airplanes. (Finding 94) There is no doubt that intrastate and certificated carriers compete.[26] (Findings 95–96)

Since 1962 when it acquired the OAG, respondent has published schedule information showing connecting flights for certificated carriers. (Findings 20, 22, 112) Respondent also published connections for replacement flights and for foreign air carriers during that time. (Findings 26, 29, 108, 109) Until December 1, 1976, and after the Federal Trade Commission started

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[26] In the few months since the Airline Deregulation Act of 1978, almost all of the larger intrastate carriers have become certificated carriers. (Finding 97) Such interchangeability clearly demonstrates an area of effective competition. *United States* v. *Continental Can Co.*, 378 U.S. 441, 456–57 (1964)

the investigation which led to the complaint in this case, respondent refused to publish free or paid connections for commuter air carriers. (Findings 14, 15, 102, 112)

Commuters rely heavily on passengers who are connecting to or from certificated airlines. (Finding 107) When connecting flight information is not listed in the OAG, the availability of that service is often not known to those booking flights. (Finding 106)

Respondent's failure to publish connections for commuter air carriers was a discriminatory abuse of economic power and caused injury to commuters and to the traveling public. (Findings 107–109) After the OAG started publishing commuter connections, commuters received a substantial increase in connecting passengers. (Finding 110) Commuters also started buying a substantial number of paid connections in the OAG. For example, after the respondent finally allowed commuters' connections to be published, one commuter bought about 3,200 paid connections in the OAG monthly at $2.30 per connection. (Whiteside 416)

The OAG has for many years published schedules in separate categories for certificated, intrastate and commuter air carriers, with the certificated carrier schedule always being listed first. (Findings 20–24) Within each category, the flights are listed chronologically. (Finding 21) Foreign carriers are listed in the OAG with certificated carriers. (Findings 25–27) Most commuter carriers which have entered replacement agreements with certificated carriers are listed in the OAG with certificated carriers. (Findings 28–34)

Users of the OAG, reading from the top down, typically select the first acceptable flight listed in the OAG for the city pair. This means that the choice of a flight is usually made before the user of the OAG reaches the categories for commuter or intrastate carriers. (Find-

ing 114) Even experienced users of the OAG overlook commuter listings. (Fugere 232–34)

Respondent performed a study for American Airlines and found that: "[w]hen American salesmen use the OAG they are prone to quote the first service displayed—even though it is competitive to American. (CX 52Z20) In selling its customer guide respondent refers to being listed first as presenting "the host carrier's service in the most advantageous manner." (CX 52D; CX 122) The OAG refers to being listed first as "preferential display of schedules." (CX 52Z)

Prior to 1971 carriers were listed alphabetically when flights had identical departure and arrival times. A TWA official, M.A. Brenner,[27] felt that this created an unfair advantage for carriers whose codes began with letters at the beginning of the alphabet. (CX 43) When this was brought to their attention at an Airlines Guides Committee meeting, the certificated airlines whose codes were toward the beginning of the alphabet opposed the change; those whose codes were toward the end of the alphabet were in favor of randomizing such listings. (CX 118)

Being listed below certificated carriers in the OAG's flight listings resulted in injury to noncertificated carriers. (Finding 115) One commuter carrier representative testified that he would pay $100,000 to be treated in the same manner as competing foreign air carriers which are listed as certificated air carriers (Ceresa 1014) A witness from a certificated carrier called by respondent testified that in the Dallas-Albuquerque market, up to 20 passengers per flight are gained by first listing. (Kyzar 1617)

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[27] One of respondent's expert witnesses described Mr. Brenner as the "world's leading authority on airline schedules." (Cooke 3334–35)

Injury to the Public

The complaint alleges that the effects of respondent's OAG publication policies have been, in part, "to suggest and/or advise the public that direct flights of certificated air carriers are to be given preference over those of intra-state and commuter air carriers." (Paragraph 16) The complaint further alleges that respondent's acts and these effects constitute a violation of Section 5. (Paragraph 18) While injury to the noncertificated carriers was the main part of complaint counsel's case, this allegation of injury to the consumers was also sustained.

When commuter connections were not published in the OAG, travel agents and airline booking agents often did not know of the existence of the commuter flight and therefore did not inform passengers who would wait for a certificated connection, sometimes losing an extra business day in doing so. (CX 20E, CX 113 p. 817) If no certificated flight was available, the passengers would rent cars to go to their final destinations. (CX 189C) Passengers were overcharged because the ticket agents were not aware of the discount available through joint fares available in many markets. (CX 107 p. 14 n.1)

Respondent's policy of separate listings also injures the traveling public who may take more expensive, and inconvenient flights with certificated airlines merely because they were not informed of the commuter flight. (Finding 115; Autry 702–03)

Respondent's discriminatory practices in the publication of the OAG evolve from its close business relationship to, and financial dependence on, the certificated air carriers. (Findings 64–66, 103) With this motivation, respondent cannot use its economic power ethically to inflict injury on consumers, regardless of whether competition has been injured. This conduct is

morally objectionable and detrimental to consumers and violates Section 5 of the Federal Trade Commission Act. *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244–45 n. 5 (1972).

Jurisdiction

Section 5 exempts from Commission jurisdiction "air carriers and foreign air carriers subject to the Federal Aviation Act of 1958." 15 U.S.C. § 45(a)(2). Respondent is not an air carrier.[28] The competitive injury here, however, is to air carriers, and respondent argues that the exemption is for the business of air transportation and not for the status of being an air carrier. In *FTC* v. *Miller*, 549 F.2d 452 (7th Cir. 1977), the court held that the similar exemption in Section 5 for common carriers subject to the Interstate Commerce Act was in terms of status and not business activities. (549 F.2d at 455) The court pointed out that, in contrast, Congress exempted the business activities—and not the status—of those subject to the Packers and Stockyards Act.[29] (549 F.2d at 455–56)

Principles of statutory construction show that the exemption should be limited solely to air carriers. The FTC Act is remedial legislation. *Sears, Roebuck & Co.* v. *FTC*, 258 Fed. 307, 311 (7th Cir. 1919). As such, it should be construed broadly so as to effectuate its purpose. *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959). The exception to a broad grant of authority is to be narrowly construed. *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 218 (1961). The "burden

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[28] Respondent admitted that: "Donnelley is not an air carrier or an indirect air carrier. . . ." Attachment A, p. 2, Answer to Motion of Respondent to Dismiss the Complaint for Lack of Jurisdiction, filed herein on September 1, 1976.

[29] The Packers and Stockyards Act exemption to Section 5 is only for "persons, partnerships, or corporations insofar as they are subject to" the Act. 15 U.S.C. § 45(a)(2).

of proving justification or exemption under a special exception to the prohibition of a statute generally rests on one claiming its benefits." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44–45 (1948).

In *Branch* v. *FTC*, 141 F.2d 31 (7th Cir. 1944), the United States Court of Appeals for the Seventh Circuit recognized these principles. The Commission there found a correspondence school had violated Section 5 by unfair practices in the sale of text books to students residing in Latin America. The school argued that it was exempt from Commission jurisdiction since it was engaged in foreign commerce. The court upheld the Commission's jurisdiction, stating (114 F.2d at 36):

> This is a remedial statute implementing national policy. By it Congress is seeking to free foreign commerce of unfair trade practices, just as it has attempted to free commerce between the States from such practices. We cannot assume that Congress intended to free only some of its foreign commerce from unfair trade practices. We are bound to give to the generic words used by Congress just as liberal a construction as the words are capable of in order to prevent such a partial protection to foreign commerce.

Similarly, Section 5 should be given a broad construction and the exemption for air carriers should not be extended to protect the unfair practices of respondent.

Congress has created no express exemption from FTC jurisdiction for the acts of respondent. *Cf.*, *Perpepetual Federal Savings & Loan Ass'n*, FTC Docket 9033, Vol. 3 Trade Reg. Rep. ¶ 21,371, at p. 21,291 (1977). Nor has there been an implied exemption to the strong national policy expressed in the Federal Trade Commission Act.[30] CAB regulation is not so pervasive

[30] The test for implied immunity is stated in *United States* v. *AT&T Co.*, 1978–2 Trade Cases ¶ 62,247 at p. 75,547 (D.D.C. 1978).

that Congress is assumed to have determined competition to be an inadequate means of vindicating the public interest. This case does not conflict with CAB regulation of air carriers.[31] Furthermore, the CAB has not exercised explicit authority over the challenged practice itself (as distinguished from the general subject matter) in such a way that antitrust enforcement would interfere with regulation.[32]

As noted above, in the memorandum opinion issued October 31, 1977, Judge Bernard M. Decker of the United States District Court for the Northern District of Illinois decided that the FTC lacks jurisdiction of this matter. *Reuben H. Donnelley Corp.* v. *FTC*, 1977-2 Trade Cases ¶ 61,721. I respectfully decline to follow Judge Decker's analysis, for the above reasons and for those in the order denying the motion to dismiss, issued herein on March 30, 1977.

First Amendment

The order issued here requires respondent to publish schedules of commuter and intrastate air carriers

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[31] In an amicus letter filed herein on February 7, 1977, the General Counsel of the CAB stated that: ". . . [T]he Board does not believe that its own jurisdiction over air carrier competition would be compromised if the Federal Trade Commission Act were construed to give the Commission subject matter jurisdiction in this case." Pursuant to the Airline Deregulation Act of 1978, much of whatever authority of the CAB has had, including § 414 of the Federal Aviation Act, 49 U.S.C. § 1384 (providing antitrust immunity) is transferred to the Department of Justice or abolished over the next few years. Public Law 95-504, Section 1601 (Oct. 24, 1978).

[32] While the agreements creating the Air Traffic Conference Committee have been filed with the CAB, the discriminatory publishing practices at issue in this case have not received CAB approval. In fact, the certificated carriers could not receive such approval because the agreements specifically exempted from the authority of the committee any subject affecting competitors. (RX 283A, Z-4, Z-7)

on the same terms and conditions as it publishes schedules of certificated carriers. This would require Donnelley to publish the OAG in a format that differs from its present format. Respondent argues that this requirement constitutes impermissible censorship of the press in violation of the First Amendment to the Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."[33]

Recent decisions of the Supreme Court have accorded some measure of First Amendment protection to commercial speech. *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). The Court has not raised commercial speech on the same level of protection as noncommercial speech. *Ohralik* v. *Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978). Furthermore, the Court has reaffirmed the necessity of regulating false deceptive or misleading speech. *Virginia Board*, 425 U.S. at 771-72. ("The First Amendment . . . does not prohibit the state from insuring that the stream of commercial information flows clearly as well as freely. . . .")

The Court has made it clear that the press is not exempt from the antitrust laws. *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945):

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[33] That the OAG is a directory and not a newspaper does not limit First Amendment protection. *Princeton Community Phone Book, Inc.* v. *Bate*, 582 F.2d 706, 710-11 (3rd Cir. 1978).

> It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom . . . Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

In *Lorain Journal* v. *United States*, 342 U.S. 143 (1951) the Court held that a newspaper had violated Section 2 of the Sherman Act and upheld an injunction preventing a newspaper, *inter alia*, from "refusing to publish any advertisement . . . or discriminating as to . . . arrangement, location . . . or any other terms or conditions of publication of advertisement or advertisements where the reason for such refusal or discrimination is in whole or in part, express or implied, that the person or corporation submitting the advertisement or advertisements has advertised . . . in or through any other advertising medium." (342 U.S. at 157) The Court held that the injunction was not a "restriction upon any guaranteed freedom of the press." (342 U.S. at 155)

These cases clearly support the constitutionality of the order issued here, and show that the First Amendment is not abridged.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent, The Reuben H. Donnelley Corporation.

2. The acts and practices charged in the complaint took place in commerce, or affect commerce, within the meaning of the Federal Trade Commission Act.

3. There is no effective substitute for the OAG for scheduled air carriers wishing to disseminate flight information or for the consuming public wishing to obtain flight information.

4. While engaged in the sale and distribution of the OAG, respondent individually, and in combination with other companies, has unfairly discriminated in its listing policies for commuter and intrastate air carriers in the following ways:

(a) For many years and until December 1, 1976, respondent refused to publish connecting flights for commuter air carriers while at the same time publishing connecting flights for certificated air carriers and others in competition with those commuter air carriers; and

(b) For many years respondent has refused and continues to refuse to display commuter and intrastate air carrier flights chronologically with certificated air carrier flights and others.

5. The effects of respondent's discriminatory policies have been to injure: (a) commuter and intrastate air carriers which have lost business as a result of such policies; and (b) the public who have been unaware of the services of commuter and intrastate air carriers as a result of such policies.

6. Respondent's unfair methods of competition and unfair acts in commerce violate Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

REMEDY

Respondent must be ordered to cease and desist the unfair practices described herein.

Respondent argues that, even assuming that its refusal to publish connections for noncertificated carriers violated Section 5, it has been publishing this information since December 1, 1976, and there is no evidence to show that it might revert to that practice if a cease and desist order is not issued. Contrary to respondent's assertion, there is evidence that but for this proceeding respondent might resume its former policy. There is evidence that the conspiracy proved in this case could easily be resumed. The representatives of the certificated airlines agreed to continue to meet with the OAG in an unofficial capacity. (CX 67) Further, respondent continues to discriminate against commuters by refusing to merge the schedules. (Finding 24) There exists some cognizable danger of recurrent violation. *SCM Corp.* v. *FTC*, 565 F.2d 807, 813 (2d Cir. 1977).

Respondent changed its policy only after, *and because*, the Federal Trade Commission started the investigation which led to the issuance of the complaint in this case. (Finding 112; Reich 1273–74; Woodward 4170–71) Stopping a practice after the government investigation starts does not show permanent abandonment. *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 47–48 (1960); *Cotherman* v. *FTC*, 417 F.2d 587, 594–95 (5th Cir. 1969); *Coro, Inc.* v. *FTC*, 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Giant Food, Inc.* v. *FTC*, 322 F.2d 977, 986–87 (D.C. Cir. 1963). ". . .[N]o assurance is in sight that [respondent], if it could shake [the Commission's] hand from its shoulder, would not continue its former course." *Sears, Roebuck & Co.* v. *FTC*, 258 Fed. 307, 310 (7th Cir. 1919).

Although not raised as a defense, respondent has transferred responsibility for the publication of the OAG, effective January 1, 1979, to a related corporation. (Finding 16) The cease and desist order should,

nevertheless, be directed at respondent. *P.F. Collier & Son Corp.* v. *FTC*, 427 F.2d 261, 271 (6th Cir. 1970). The question whether Official Airline Guides, Inc., is the successor to respondent, and therefore liable under the order, can be determined in a compliance proceeding. *Id.* at 272.

ORDER

I.

For the purpose of this Order, the following definitions shall apply:

A. "OAG" refers to the Official Airline Guide—North American Edition.

B. "Certificated air carrier" refers to an air carrier that holds a certificate of public convenience and necessity issued by the United States Civil Aeronautics Board ("CAB") authorizing it to fly its routes.

C. "Commuter air carrier" refers to an air carrier which flys pursuant to an exemption set forth in Part 298 of the CAB's regulations.

D. "Intrastate air carrier" refers to an air carrier which operates solely within a state of the United States pursuant to the authority of the Federal Aviation Administration and state regulation and which performs scheduled flight service, but which does not hold a certificate of public convenience and necessity or foreign air carrier permit issued by the CAB.

II.

IT IS ORDERED that respondent, The Reuben H. Donnelley Corporation; its parent; subsidiaries; any concern controlled by respondent, including joint ventures; its successors and assigns; and its officers, agents, representatives, employees, directly or indirectly, through any corporate or other device, indi-

vidually or in combination, in the publication of flight listings in the OAG or successor publications shall forthwith cease and desist:

1. From discriminating among the flight listings of commuter air carriers, intrastate air carriers and those of certificated air carriers in the order of listing of those carriers in any city pair in the OAG.

2. From discriminating among the flight listings of commuter air carriers, intrastate air carriers and those of certificated air carriers in the opportunity offered those carriers to receive free connection listings or to purchase paid connection listings in the OAG.

3. Nothing in Paragraphs 1 and 2 of this Order shall prohibit respondent from designating certificated, intrastate and commuter air carriers by appropriate symbols.

III.

IT IS FURTHER ORDERED that respondent (as that term is used in Section II) shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent or its successors or assigns which may affect compliance obligations arising out of the Order, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of the parent, subsidiaries or joint ventures of respondent.

IV.

IT IS FURTHER ORDERED that within sixty (60) days from the date of service of this Order, and on a periodic basis thereafter, respondent (as that term is used in Section II) shall submit, in writing, to the Federal Trade Commission reports setting forth in de-

tail the manner and form in which respondent is meeting its compliance obligations.

/s/ _____

JAMES P. TIMONY
Administrative Law Judge

MARCH 6, 1979

APPENDIX E

RELEVANT STATUTORY PROVISION

1. Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), provides:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

2. Section 2 of the Sherman Act, 15 U.S.C. 2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

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No. 80-961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL TRADE COMMISSION,
Petitioner,

v.

OFFICIAL AIRLINE GUIDES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT OFFICIAL AIRLINE GUIDES, INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the antitrust laws, and thus Section 5 of the Federal Trade Commission Act, prohibit an alleged monopolist from unilaterally denying access to a resource which it controls, where such denial is not the result of any anticompetitive motive or intent, and has alleged competitive effects solely within a market in which the monopolist does not compete, if in the opinion of the Federal Trade Commission the "business justification" for the denial of access is inadequate?

In addition to this issue, which the Federal Trade Commission admits in its Petition for a Writ of Certiorari is "not likely to occur with great frequency," the following questions are presented for review by this Court if it grants the Petition:

2. Does the First Amendment to the Constitution of the United States bar an order by the Federal Trade Commission requiring the private, independent publisher of an informational directory to include certain information in its directory where it is admitted that the publisher had no anticompetitive motive or intent in previously excluding such information?

3. Does the Federal Trade Commission have subject matter jurisdiction under Section 5(a)(2) of the Federal Trade Commission Act over a case concerned exclusively with the regulation of competition among air carriers, which expressly are excluded from the Federal Trade Commission's jurisdiction by Section 5(a)(2)?

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BRIEF OF RESPONDENT OFFICIAL AIRLINE GUIDES, INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATUTES INVOLVED

Pertinent portions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 11 of the Clayton Act, 15 U.S.C. § 21, are set forth in Appendix A, *infra*.

STATEMENT

A. Introduction

The Reuben H. Donnelley Corporation ("Donnelley") is the publisher of the *Official Airline Guide* ("OAG"),[1] a

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[1] The Reuben H. Donnelley Corporation, a wholly-owned subsidiary of The Dun & Bradstreet Corporation, published the *Official Airline Guide* until January 1, 1979 when that responsibility

twice-monthly publication which combines into an informational directory the passenger flight schedules of substantially all of the scheduled air carriers operating in North America. On September 18, 1980, the United States Court of Appeals for the Second Circuit unanimously reversed a Federal Trade Commission ("FTC" or "Commission") order issued on January 10, 1980 directing Donnelley to publish in the OAG commuter air carrier connecting flight schedule listings. The publishing policy ordered by the FTC had been adopted by Donnelley, and the Commission had been so notified, in October 1975 (some six months prior to issuance of the FTC's complaint), had been implemented in 1976 and has continued in effect since then. (R. 23-30, 647).[2] Donnelley has no intention of changing its existing policy of publishing commuter air carrier connecting flight schedule listings, which is in full accord with the Commission's order. Accordingly, this case was moot as a matter of fact—if not as a matter of law—for more than three years prior to the entry of the Commission's order, and has now been factually moot for more than four years.

For many years, the OAG has published the direct flight schedule listings of the three legal classifications of scheduled air carriers—certificated, commuter and in-

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was assumed by Official Airline Guides, Inc., also a wholly-owned subsidiary of The Dun & Bradstreet Corporation. To avoid confusion, the publisher of the OAG will be referred to herein as "Donnelley" as it previously has been throughout the proceedings before the Federal Trade Commission and the federal courts.

[2] The following abbreviations are used for citations in this brief: (a) "R." refers to the Joint Appendix filed in the court of appeals; (b) "Pet." refers to the FTC's Petition for a Writ of Certiorari; (c) "App." refers to an appendix to the Petition; (d) "RX" refers to Donnelley's evidentiary exhibits admitted in the FTC proceedings; and (e) "CX" refers to the FTC staff's evidentiary exhibits admitted in the FTC proceedings.

trastate—in separate corresponding classifications under each city pair, with commuter and intrastate air carrier listings designated by the headings "Commuter Air Carriers" and "Intrastate Air Carriers." The classification of air carriers known as "commuter air carriers" was created by the Civil Aeronautics Board ("CAB") as a sub-category of "air taxis" in 1969, and these carriers were restricted to the operation of small aircraft in order to prevent them from competing with certificated air carriers. (R. 64). Commuter air carriers were intended by the CAB "to fill service gaps" in the schedules of certificated air carriers by providing "services with small aircraft [which are] fundamentally different from [those] of certificated operations," and which offer no serious competition to certificated air carriers.[3] *Part*

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[3] In 1974, commuter and certificated air carriers competed in, at most, eighty-two city pairs (R. 485), or 0.4% of the more than 20,000 city pairs shown as receiving scheduled air carrier service in the February 1, 1974 issue of the OAG. (CX 57-A). Moreover, even in these few instances there was no significant competition between the two classes of carriers since commuter air carriers generally are scheduled to fill gaps in the flight schedules of certificated air carriers, and where certificated and commuter air carrier scheduling is comparable, commuter air carriers are a distant second choice of travelers. (*See, e.g.*, R. 184, 391, 402-03). Nonetheless, in 1971 (five years before the OAG began publishing commuter air carrier connecting flight schedule listings), 70% of commuter air carrier passenger traffic was comprised of connecting passengers (Pet., App. A at 8a), reflecting the fact that users of the OAG were able to "construct a connection" using the OAG when a commuter air carrier flight was appropriate. (*See, e.g.*, R. 390).

The Petition incorrectly states that "as of April 1975, 432 pairs of cities were served by direct flights of commuter and certificated carriers operating in competition with each other . . . ." (Pet. at 3). The Commission's opinion, which the Petition cites, did not find that there was competition in 432 city pairs. It merely cited CX 135-E (R. 532), which shows only that 432 city pairs were *served*

298 Weight Limitation Investigation, CAB Order 72-7-61, p. 17 (1972), *aff'd sub nom., Hughes Aircraft Corp.* v. *CAB*, 492 F.2d 567 (D.C. Cir. 1973).

In 1971, an official of the OAG recommended to its chief executive officer that the OAG publish commuter air carrier connecting flight schedule listings and combine or "merge" the direct flight schedule listings of certificated and commuter air carriers. The OAG's chief executive rejected this recommendation, principally because of his concern as to the "reliability of the service performed by the commuter carriers as of this date both from a standpoint of adherence to schedules and safety." (Pet., App. C at 61a).[4] Prior to October 1975, Donnelley viewed the issue of publishing commuter air carrier connecting flight schedule listings as being tied to the issue of merging the direct flight schedule listings of all three

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by both commuter and certificated air carriers, not that there was any significant *competition* between the two classes of air carriers in those city pairs.

[4] The Commission's Petition asserts that, based on a March 1975 letter from Donnelley's executive vice-president to a commuter air carrier, Donnelley's "executives recognized that a 'disservice is being done' to commuter air carriers" by the absence of commuter air carrier connecting flight schedule listings in the OAG. (Pet. at 4). The Commission has quoted only a portion of the letter and distorted its meaning as a result. The letter observed in relevant part that:

> "[T]he fact that we do not show connecting service between commuter carriers and certificated carriers has been the subject of a great deal of discussion and writings during the last several years . . . . There are a number of very efficient and reliable commuter carriers to whom a disservice is being done . . . . Under the law, we must treat all carriers of one class, in this case commuter air carriers as designated by the CAB, exactly the same. Therefore, unless some further legal distinction can be made between the various commuter carriers, we remain unwilling to change our present listing policies as we feel we would be doing our subscribers a disservice." (RX 54).

classes of air carriers. Donnelley therefore initially determined not to publish such connecting flight schedule listings because it had decided not to merge the direct flight schedule listings. (*Id.* at 77a). In October 1975, for a number of reasons and in the exercise of its editorial judgment, Donnelley decided to begin publishing commuter air carrier connecting flight schedule listings and implemented this decision in December 1976.

B. The Decision of the Federal Trade Commission

In 1976, the FTC issued a complaint against Donnelley alleging that its refusal to combine the direct flight schedule listings of the three legal classifications of air carriers, and its previous refusal to publish in the OAG the connecting flight schedule listings of commuter and intrastate air carriers, had adversely affected competition in domestic scheduled passenger air transportation. (R. 12).

Ultimately, after prolonged administrative proceedings, the Commission held that Donnelley's conduct had not been based on any anticompetitive motive or intent. (Pet., App. C at 65a-66a). The FTC also held that "Donnelley had a substantial business justification for its separate listing policy," which was based on "Donnelley's belief that certificated carriers provide more reliable flight information for listing in the OAG, and are generally faster, safer, and more comfortable than commuter carriers." (Pet., App. C at 79a). The FTC thus upheld Donnelley's policy of publishing separately the direct flight schedule listings of certificated and commuter air carriers.[5]

However, the FTC found that Donnelley's policy prior to 1975 of not publishing commuter air carrier connecting flight schedule listings was "arbitrary," and had caused commuter air carriers "significant competitive injury." (Pet., App. C at 77a). On the asserted basis of

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[5] The FTC considered and rejected the claim that Donnelley's publishing policies had been the result of a conspiracy between it and various certificated air carriers. (Pet., App. C at 57a-64a).

the antitrust laws, the Commission's opinion sought to impose on a "monopolist" a new legal "duty not to be arbitrary," which would apply even when the challenged action had no anticompetitive motive or intent and did not result in any competitive benefit to the "monopolist." (*Id.* at 72a). The Commission held that Donnelley's prior policy of not publishing commuter air carrier connecting flight schedule listings violated this new legal duty (*id.* at 76a), was "inconsistent with the fundamental goals of antitrust" (*id.* at 73a) and that Donnelley thus had violated Section 5 of the FTC Act. (*Id.* at 77a).

In reaching this result, the Commission was remarkably candid in confronting the obstacle to its decision posed by the doctrine established in *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919), of "the long-recognized right of [a] trader . . . freely to exercise his own independent discretion as to parties with whom he will deal." Indeed, the FTC frankly declared its intention to disregard the applicability of *Colgate* to this case. The Commission stated that although "[t]he result here may be inconsistent to some extent with the theory of the *Colgate* doctrine, . . . we believe the philosophy of *Colgate* must give way to a limited extent where . . . business judgment is exercised by a monopolist in an arbitrary way." (Pet., App. C at 73a-74a n.37).

C. The Decision of the Court of Appeals

Donnelley petitioned for review of the Commission's order in the United States Court of Appeals for the Second Circuit, arguing that the order should be set aside on the grounds that (1) the FTC lacks subject matter jurisdiction in this case, (2) the First Amendment bars the Commission's order, (3) Donnelley's conduct had been entirely lawful under the antitrust laws, and (4) the Commission had failed to satisfy the legal standard governing entry of an order prohibiting conduct which had long since been terminated.

A panel of the court of appeals, consisting of Circuit Judges Oakes and Van Graafeiland and District Judge Nickerson (of the Eastern District of New York, sitting by designation), heard oral argument on June 17, 1980, and rendered a unanimous decision (opinion by Circuit Judge Oakes) on September 18, 1980. (Pet., App. A). The court of appeals held that the statutory exclusion of "air carriers" from the FTC's jurisdiction under Section 5(a)(2) of the FTC Act operates only *in personam* and does not otherwise limit the Commission's authority to regulate competition in the air carrier industry. (Pet., App. A at 5a-7a). The court also found that the Commission's order—had it been otherwise valid—would have been a proper prohibition of terminated conduct. (Pet., App. A at 16a).

However, the court of appeals rejected the novel "duty not to be arbitrary" which the FTC had attempted to create under the antitrust laws and reversed the Commission's order on the grounds that (1) such a duty was contrary to the *Colgate* doctrine; (2) the new duty was not supported by any previous decisions; and (3) "enforcement of the FTC's order here would give the FTC too much power to substitute its own business judgment . . . in any decision which arguably affects competition in another industry. Such a decision would permit the FTC to delve into . . . 'social, political or personal reasons' for a monopolist's refusal to deal." (Pet., App. A at 10a-15a). Due to this resolution of the antitrust issue, upon which the court of appeals based its reversal of the Commission's order, it did not reach the First Amendment issue. (Pet., App. A at 2a, 16a).

The Commission sought no further consideration of this case by the court of appeals subsequent to the panel's unanimous decision.

D. The Petition for a Writ of Certiorari

The Petition for a Writ of Certiorari concedes—as it must—that this case involves circumstances which "are not likely to occur with great frequency." (Pet. at 20). Nonetheless, the Commission now seeks review of the decision of the court of appeals striking down the new "duty" of a monopolist which the Commission had sought to establish under the antitrust laws. The Petition makes clear, as did the Commission's own opinion, that the asserted basis of the Commission's order is "the fundamental policy of the federal antitrust laws." (Pet. at 11). However, the Petition departs from the Commission's previously-consistent analysis of this case as one which, although concededly "outside the mainstream of law concerning monopolies" (Pet., App. C at 66a-67a), is based solely on antitrust law principles. Thus, the Petition urges that "this case presents an important question concerning the limits of the [FTC's] authority under Section 5 of the [FTC Act] to declare abuses of monopoly power 'unfair methods of competition.'" (Pet. at 10). The Petition then asserts that the court of appeals applied a "narrow interpretation" of that statute which is alleged to be inconsistent with "the broad standard of Section 5—a standard that Congress intended to be 'flexible'. . . . [citations omitted]." (Pet. at 21). The Petition thus invokes for the first time a purported basis for the Commission's order which is independent of recognized antitrust principles.

SUMMARY OF ARGUMENT

The Commission's Petition for a Writ of Certiorari presents no ground under Rule 17(1) of this Court's Rules for the issuance of the writ, nor does the Petition present any other matter warranting review by this Court. The Commission cannot now abandon the antitrust law basis of its order and substitute some other undefined and "flexible" basis, beyond the antitrust laws, which it purports to draw from the FTC Act. The ruling of the court of appeals clearly was correct, and the Commission's order is not supported by—and indeed is contrary to—all recognized antitrust law principles, particularly the doctrine established by this Court in *Colgate*. The Commission's attempt to impose a "duty not to be arbitrary" where only unilateral action is involved finds no support in cases involving joint refusals to deal, and this "duty" improperly would permit the FTC to substitute its judgment on business decisions for that of the businessmen involved. In addition, there is no conflict between the decision of the court of appeals in this case and any decision of any other United States Court of Appeals.

Moreover, even if the Commission's order were valid under the antitrust laws, it is barred by the First Amendment as an impermissible infringement of Donnelley's right freely to exercise its editorial judgment in the formulation of its publishing policies. Finally, the Commission lacks subject matter jurisdiction over competion among air carriers, and cannot subvert this jurisdictional limitation merely by proceeding, as it has here, against a party over which it has *in personam* jurisdiction.

ARGUMENT

1. Having failed in the court below to sustain its order on antitrust grounds, the Commission apparently now is attempting to convert this case—which both it and the court of appeals decided explicitly and solely on antitrust grounds—into one which presents an issue of the construction of the phrase "unfair methods of competition" in Section 5 of the FTC Act.[6] No such issue properly may be presented here. The FTC's opinion not only made no attempt to base its decision on any distinction between Section 5 and the antitrust laws, but indeed stated that the Commission saw no reason "why a similar duty would not arise under the Sherman Act." (Pet., App. C at 74a n.39). It is now too late in this case for the Commission to attempt to draw a distinction between the scope of Section 5 and that of the antitrust laws.

As this Court held in *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 247 (1972), where "[t]here is no indication in the Commission's opinion that it found [the challenged] conduct to be unfair in its effect on competitors because of considerations other than those at the root of the antitrust laws," its decision must be tested solely under those laws. Thus, having grounded its decision in

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[6] In its opinion, the Commission framed the question before it as "whether antitrust liability may attach" to Donnelley's conduct, a "policy issue" which, according to the FTC, "has perplexed antitrust *cognoscenti* for decades. . . ." (Pet., App. C at 24a). Moreover, in characterizing its decision, the Commission referred to "antitrust enforcement" and "antitrust enforcers" (*id.* at 73a-74a), and held that "the antitrust laws" could compel the action it had ordered. (*Id.* at 76a; *see also*, p. 11 n.7, *infra*). Although the Commission referred in passing to the "unfair methods of competition" phrase contained in Section 5 of the FTC Act (*id.* at 76a), it did not invoke that language as a basis for its decision independent of antitrust law principles. Nor has the Commission anywhere undertaken to explain how that language could apply to Donnelley, which is conceded to have had no anticompetitive motive or intent and indeed, according to the FTC, is a "monopolist."

this case on antitrust analysis, the FTC may not now shift its ground and seek to have Donnelley's conduct declared unlawful under Section 5 "because of considerations other than those at the root of the antitrust laws." [7] This Court established that fundamental principle long before *Sperry & Hutchinson*, holding in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943), that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

2. It is clear that the Commission's order has no valid basis in the antitrust laws, and the court of appeals correctly decided the legal question presented by the FTC to this Court. As the Commission's opinion accurately pointed out, "this case differs from ordinary monopolization cases where challenged acts or practices were engaged in to benefit the monopolist competitively, either in the market in which the monopoly power existed or in some adjacent market into which the monopolist had extended its operations" (Pet., App. C at 65a), and "Donnelley's policies, which have affected competition in the air transportation market, were not intended to benefit Donnelley in that market." (*Id.* at 66a).

This case thus involves unilateral action by a company which the Commission concedes had no motive or purpose to affect competition in any line of commerce, and which did not affect competition in the market in which it is engaged. No case supports the FTC's effort to declare such

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[7] The Petition's comment that *Sperry & Hutchinson* "differs from this case" because the practices challenged there "were viewed as not violating either the letter or spirit of the antitrust laws" (Pet. at 14 n.16), in no way diminishes the fact that the Commission may not now attempt to shift the basis of its order in this case. Moreover, in comparing the practices involved in *Sperry & Hutchinson* to those challenged here, the Petition clearly acknowledges that the FTC's order was based on antitrust law considerations by alleging that Donnelley's conduct "undermined competitive conditions . . . *which the antitrust laws were unquestionably designed to protect.*" (*Id.*; emphasis added).

behavior a violation of the antitrust laws. To the contrary, as the court of appeals correctly ruled, *Colgate* supports the lawfulness of unilateral action by a monopolist to decide with whom it will deal so long as it has no purpose to restrain competition or to expand or enhance its monopoly. Moreover, as the court below noted but the FTC ignores, this Court last term reaffirmed the *Colgate* doctrine in *Reeves, Inc.* v. *Stake*, —— U.S. ——, 48 U.S.L.W. 4746, 4749 (June 19, 1980).

In arguing that the FTC should be able to pass upon the reasonableness of refusals to deal by alleged monopolists with no purpose of furthering their own monopolies, the FTC seeks to have this Court discard—as the FTC itself has already done—the principle enunciated in *Colgate* that "[t]he purpose of the Sherman Act is . . . in a word, to preserve the right of freedom to trade." (250 U.S. at 307). In its place, the Commission would install itself as a "Monday morning quarterback" reviewing the justification of business decisions made by alleged monopolists. The rejection by the court of appeals of the FTC's attempt to exercise such sweeping authority is consonant with this Court's decisions, and there is no reason for this Court to reconsider the principles expressed in *Colgate* and reaffirmed last term in *Reeves, Inc.* v. *Stake.*

3.a. The "duty not to be arbitrary" where only unilateral conduct is involved, which the FTC seeks to impose here, is not established by cases involving joint refusals to deal. The FTC previously has conceded this (Pet., App. C at 72a), although its Petition struggles to find some support in those decisions.[8] Moreover, the court of appeals clearly recognized that the cases involving joint refusals to deal, resulting in injury to the defendants' competitors, are inapposite to this case. (*See* Pet.,

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[8] The cases cited by the Petition are *United States* v. *Associated Press*, 52 F. Supp. 362, 373 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945); *United States* v. *Terminal Railroad Ass'n*, 224 U.S. 383 (1912); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). (Pet. at 9).

App. A at 12a). The Commission's assertion in its Petition that the court of appeals "disregarded these cases because they involved joint refusals to deal, rather than a unilateral refusal by a monopolist" (Pet. at 15), simply ignores the opinion of the court of appeals. In noting that these cases "involved joint refusals to deal resulting in injury to the *defendants'* competitors," the court below even went so far as to place in italics the word "*defendants.*" (Pet., App. A at 12a). The court then properly rejected the Commission's disingenuous plea that it is but "a small step" from cases declaring unlawful joint activity injuring the defendants' competitors, to a case imposing antitrust liability on unilateral behavior involving only a line of commerce in which the defendant is not engaged. (Pet., App. C at 72a).

3.b. The Commission also argues that the court of appeals erred in rejecting the Commission's effort to attach antitrust liability to the unilateral acts of a monopolist "because it believed that the Commission's view would extend Section 5 to troublesome cases in which refusals to deal are based on social, political or personal preference." (Pet. at 18). However, the court's concern clearly went beyond the "troublesome cases" referred to by the FTC, and the court properly held that the FTC is not authorized "to substitute its own business judgment" in *any* case. (Pet., App. A at 14a-15a). Although the Commission urges that its decision has "carefully defined limits" (Pet. at 18), those purported "limits" did not prevent the Commission in this case from simply disregarding the evidence showing that Donnelley's OAG publishing policies were motivated by the economic necessity to preserve the integrity of its publication.[9] The "carefully defined lim-

[9] The problems inherent in permitting the FTC to substitute its judgment for that of businessmen are clearly illustrated by this case. The FTC recognized that "Donnelley viewed the issue of listing commuter . . . connecting flights as being tied to the issue of merging the listings," and that Donnelley's decision against merger "was based on [its] belief that certificated carriers provide

its" claimed by the FTC thus plainly are insufficient protection against the Commission's unreasonable application of the protean standard it seeks to have this Court approve.

4. There is no conflict between the decision of the court of appeals and the decision in *LaPeyre* v. *FTC*, 366 F.2d 117 (5th Cir. 1966), which the FTC now apparently claims to be directly on point. *LaPeyre* is clearly distinguishable on its facts from this case. The Commission attempts to read out of *LaPeyre* the crucial fact that the price discrimination practiced by the family which held a monopoly on certain shrimp peeling machinery was intended "to protect their own interest as [Gulf Coast] shrimp canners . . . from the competition of the [Pacific Northwest shrimp] canners." (366 F.2d at 120). As the court below succinctly observed:

> "[T]he fact remains that the utilization of monopoly power in one market in *LaPeyre* resulted in discrimination and the curtailment of competition in another market in which the monopolist himself was also engaged, and this surely distinguishes *LaPeyre* from the present case." (Pet., App. A at 13a).

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more reliable flight information . . . and are generally faster, safer and more comfortable than commuter carriers." (Pet., App. C at 79a). The Commission's "arbitrariness" finding is thus based merely on its disagreement with Donnelley's past application of these reasons to the question of whether it should publish commuter air carrier connecting flight schedule listings, not with the validity of the reasons themselves. There is no proper basis for this substitution of the Commission's judgment for Donnelley's. All of Donnelley's publishing policies have been reasonably based on the legitimate business reasons noted by the Commission, and with which Donnelley "is vitally concerned" in publishing the OAG. (*Id.* at 39a). Where the line is to be drawn on any particular issue of publishing policy, such as the one involved here, should not be second-guessed by the FTC under the rubric of an "arbitrariness" determination as was done—and done incorrectly—in this case.

LaPeyre, which has been described as "a classic case of price discrimination," [10] has no application here.

The footnote dictum commenting on *LaPeyre* in *Fulton* v. *Hecht*, 580 F.2d 1243, 1248-49 n.2 (5th Cir. 1978), to which the Commission points (Pet. at 12), was essentially unrelated to the issue before that court, contains no rationale and offers no analytical support for the Commission's theory. There is thus no basis for the Commission's claim of a conflict between the *LaPeyre* decision and the decision of the court of appeals in this case.

5. In addition to its lack of any valid basis in the antitrust laws, the Commission's order compelling Donnelley to publish certain information in the OAG violates the First Amendment. A publisher which unilaterally declines to publish some material, without any anticompetitive motive or intent, cannot constitutionally be compelled —by the government or by any other party—to publish the material it has rejected. The Petition maintains lamely that "the Commission recognized that some refusals to deal based on social or political grounds may present difficult issues, requiring a balancing of interests under the First Amendment." (Pet. at 19-20). However, the Commission's opinion failed to perform even the most rudimentary balancing analysis.

Not surprisingly, the Commission ultimately concluded that the First Amendment provided no barrier to its compulsory publication order. It held that the OAG,

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[10] 3 P. Areeda and D. Turner, *Antitrust Law* 238-39. The same authors have commented with regard to *LaPeyre* that "the Commission's opinion does not command the reader's respect because it states or explores no rationale, and because it shows no awareness of the considerations bearing on the wisdom of requiring an integrated monopolist to deal with his rivals." (*Id.* at 239). Further, Professors Areeda and Turner noted that neither the rationale of Commissioner Elman (in a concurring opinion) nor that of the majority is "sufficient to make out a § 2 violation . . . [n]or should it be a violation of FTC Act § 5." (*Id.* at 239 n.10).

which it termed "a passive receptacle only for 'commercial' speech," was not "entitled to the same high level of protection that is applicable to other forms of speech" (Pet., App. C at 82a), and summarily denied the OAG any First Amendment protection whatsoever. Clearly, however, the OAG is a complex informational directory which involves the exercise of extensive editorial judgment, is much more than "a passive receptacle," and is more closely analogous to a newspaper than to advertising material which merely proposes a commercial transaction. Thus, the OAG is entitled to a relatively high level of constitutional protection. (*See, e.g., Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 761-73 (1976)).

This Court's decision in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), establishes that the government, no matter how well-intentioned, may not compel the publication of material which a newspaper does not wish to publish. In that case, the Court struck down a state "right of reply" statute providing that a candidate for public office whose personal character or official record had been assailed by a newspaper could require that the newspaper publish, without charge, any reply the candidate might make. Even though this Court recognized that many newspapers are monopolists in their local markets (418 U.S. at 249 & n.13), it held that an enforceable right of access to a newspaper through governmental coercion violates the First Amendment.[11]

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[11] A number of lower courts have reached similar conclusions in comparable cases. *See Chicago Joint Board, Amalgamated Clothing Workers* v. *Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Person* v. *New York Post Corp.*, 427 F. Supp. 1297 (E.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977); *Mississippi Gay Alliance* v. *Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977); *Gore Newspapers Co.* v. *Shevin*, 397 F. Supp. 1253, 1256 (S.D. Fla. 1975).

As Mr. Justice White observed in his concurring opinion (418 U.S. at 259):

> "*A newspaper or magazine is not a public utility subject to 'reasonable' governmental regulation* in matters affecting the exercise of journalistic judgment as to what shall be printed." (Emphasis added).

Neither of the cases cited by the Commission on this issue (*National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978), and *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951) (Pet. at 20 n.23)), suggests that, in the absence of any anticompetitive motive or intent, the government can compel publication under the antitrust laws of material which a publisher chooses not to publish. Thus even if the Commission's order were found to be otherwise valid, it still would be barred as a violation of the First Amendment.

6. Finally, the FTC has no subject matter jurisdiction over competition among air carriers, the only line of commerce at issue in this case. Section 5(a)(2) of the FTC Act excludes from the FTC's jurisdiction "air carriers . . . subject to the Federal Aviation Act of 1958," and the FTC therefore has no jurisdiction over the subject of competition among air carriers. Obviously, Donnelley is not an air carrier and is not exempt from the FTC's *in personam* jurisdiction, and Donnelley has never contended otherwise. However, the Commission's admitted *in personam* jurisdiction over Donnelley is wholly irrelevant to the question of whether the FTC has jurisdiction over the *subject matter* of its proceeding here, which is competition among air carriers.

By excluding air carriers from the FTC's *in personam* jurisdiction under Section 5(a)(2) of the FTC Act, Congress clearly removed the subject of competition among air carriers from the FTC's jurisdiction, thus barring the FTC from proceeding against a non-carrier when its

only purpose is to regulate competition among air carriers. This is demonstrated by the closely analogous case of *Fruit Growers' Express Inc.* v. *FTC*, 274 F. 205 (7th Cir. 1921), *cert. dismissed*, 261 U.S. 629 (1923). There the court held that the FTC lacked subject matter jurisdiction to enforce the Clayton Act in a case arising from a contract between several rail carriers subject to the jurisdiction of the Interstate Commerce Commission, which were not parties to the FTC case, and the respondent in the FTC case, which was subject to the Commission's *in personam* jurisdiction. Section 11 of the Clayton Act, 15 U.S.C. § 21, excludes from the FTC's jurisdiction the same regulated businesses (banks, air carriers, surface carriers and communications carriers) excluded from its jurisdiction under Section 5(a)(2) of the FTC Act, and provides that jurisdiction to enforce the Clayton Act as to those businesses is vested in the appropriate federal regulatory agencies. The court held that Section 11 of the Clayton Act thus removed from the FTC's jurisdiction any case "where the facts involve common carriers, *or the business of common carriers* . . . ." (274 F. at 207; emphasis added). Subsequently, the FTC itself in *Crush International Ltd.*, 80 F.T.C. 1023, 1026 (1972), characterized *Fruit Growers' Express* as holding that the Commission was without subject matter jurisdiction over the business of regulated common carriers.[12]

On the basis of the analytical framework established by *Fruit Growers' Express*, the Commission in fact was held to lack subject matter jurisdiction over this case in *The Reuben H. Donnelley Corp.* v. *FTC*, [1977-2] Trade

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[12] The court below incorrectly and without explanation interpreted *Fruit Growers' Express* as resting solely on the ground that the carriers involved, over which the FTC lacked even *in personam* jurisdiction, were necessary parties to the Commission proceeding. (Pet., App. A at 6a-7a).

Cas. (CCH) ¶ 61,721 (N.D. Ill. 1977).[13] The court observed in *Donnelley* that Section 5 of the FTC Act and Section 11 of the Clayton Act "were intended to accomplish the same purpose" ([1977-2] Trade Cas. at 72,942) of exempting from both statutes four specific industries which are regulated by the specialized agencies Congress has created to determine, *inter alia*, the appropriate competitive relationships within each industry. Upon this basis, the court declared that ([1977-2] Trade Cas. at 72,943):

> "It is thus natural that Congress would wish to exempt these lines of commerce from the jurisdiction of an agency like the FTC, whose mandate is to promote free competition in the sectors of the economy not subject to such detailed regulation [citation omitted]. [*The FTC has*] *advanced no reason why Congress should have exempted the subject of competition between air carriers from the FTC's jurisdiction under the Clayton Act, and have given the same subject back to the FTC under § 5(a)(2) of the FTC Act while simultaneously depriving it of jurisdiction over the carriers themselves.*" (Emphasis added).

Neither the Commission nor the court of appeals has advanced any such reason, and it is apparent that none

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[13] This decision and the permanent injunction against the FTC's proceedings which the district court had entered were vacated subsequently on the ground that Donnelley had not exhausted its administrative remedies. *The Reuben H. Donnelley Corp.* v. *FTC*, [1977-2] Trade Cas. (CCH) ¶ 61, 783 (N.D. Ill. 1977). On cross-appeals, the United States Court of Appeals for the Seventh Circuit held that venue was improper in the Northern District of Illinois. *The Reuben H. Donnelley Corp.* v. *FTC*, 580 F.2d 264 (7th Cir. 1978). The case was then transferred to the United States District Court for the District of Columbia, where Donnelley's complaint again was dismissed on exhaustion grounds. Donnelley did not pursue the jurisdictional matter further at that time.

exists. If the Court grants a writ of certiorari in this case, it clearly should review the question of whether the Commission has jurisdiction over the subject matter of competition among air carriers before reaching the other questions presented here.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Relevant Statutory Provisions

1. Section 5(a)(2) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(2), provides:

> "The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

2. Section 11(a) of the Clayton Act, 15 U.S.C. § 21(a), provides in relevant part:

> "Authority to enforce compliance with sections 13, 14, 18 and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce. . . ."

No. 80-961

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL TRADE COMMISSION, PETITIONER

v.

OFFICIAL AIRLINE GUIDES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

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In the petition, we have demonstrated that the court of appeals erred in setting aside the Commission's order on the basis of dicta in *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919) (Pet. 17-18); that the court's concerns about undue extension of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, are unfounded (Pet. 18-20); and that the decision here conflicts with *LaPeyre* v. *FTC*, 366 F.2d 117, 120-121 (5th Cir. 1966) (Pet. 12-14). Respondent's brief in opposition raises several additional contentions that we discuss briefly below.

1. The Commission's decision declared Donnelley's conduct unlawful under Section 5 based on competitive considerations fundamental to the antitrust laws: that a monopolist must "take into account the effect on competition" of its intentional discriminatory action (Pet. App. 76a; see also Pet. 10-16). Respondent therefore mischaracterizes the record in contending

(Br. in Opp. 10-11) that, in this Court, the Commission is attempting to shift its legal theory from an antitrust theory to some other "unfair methods of competition" theory under Section 5 of the FTC Act. If respondent is contending that the Commission's decision rests exclusively on Section 2 of the Sherman Act, it simply disregards the Commission's express disavowal of that intent (Pet. App. 74a n.39). From the beginning, this case has been founded on antitrust principles applicable under Section 5 even though a Sherman Act suit might not lie against the challenged conduct (Pet. 10-14). Respondent itself correctly describes the Commission's holding to be that its conduct was " 'inconsistent with the fundamental goals of antitrust' * * * and that Donnelley thus had violated Section 5 of the FTC Act" (Br. in Opp. 6). These conclusions rested on the Commission's findings that Donnelley's refusal to publish commuter air carrier connecting flight schedules, while publishing the schedules of competing carriers, was arbitrary, caused commuter air carriers significant competitive injury, and represented an abuse of Donnelley's monopoly position. After thoroughly scrutinizing the record, the court of appeals agreed that Donnelley had not offered the Commission any explanation for its refusal to list commuter flights (Pet. App. 8a).[1] The factual issues

[1] Donnelley now contends that its exclusion of the commuter air carriers' schedules were justified "by the economic necessity to preserve the integrity of its publication" (Br. in Opp. 13). In the court of appeals, however, Donnelley conceded that "the Commission's opinion [concerning the absence of any explanation] is correct. * * * Donnelley did not argue the issue" (C.A. Br. 39-40). The purported justifications it now invokes pertained to a separate issue on which Donnelley prevailed before the Commission—whether Donnelley's re-

in this case have thus been resolved by the Commission's findings as sustained by the court of appeals. The only legal issue before this Court is whether a monopolist who unilaterally and arbitrarily (*i.e.*, without reasonable business justification) inflicts injury upon competition in a market in which it does not compete violates Section 5 of the FTC Act.

2. Donnelley challenges (Br. in Opp. 17-18) the court of appeals' holding that the Commission has "subject matter" jurisdiction over its activities. It invokes Section 5(a)(2) of the FTC Act, 15 U.S.C. 45(a)(2), which exempts from the Commission's jurisdiction "common carriers subject to the Acts to regulate commerce, [and] air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 * * *." Donnelley appears to reason that, although it is a publisher not regulated under the Federal Aviation Act, it enjoys complete immunity because its misconduct, as distinguished from its status, involved activities affecting competition in the air carriage market. That argument is without foundation, as the court of appeals correctly explained: "[I]t is of no significance that the publishing of airline schedules is an activity affecting competition among air carriers subject to the Federal Aviation Act. Since Donnelley is not itself an air carrier, it is not beyond

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fusal to merge certification and commuter listings under comprehensive city-pair headings was anti-competitive under Section 5 (Pet. App. 33a-45a, 78a). Donnelley's further contention that its conduct had only a *de minimis* effect on air carrier competition was also properly rejected by the court of appeals because substantial evidence supported the Commission's finding that its exclusionary practices affected commerce involving "tens of millions of dollars" of revenues in city-pairs where commuter and certificated carriers compete (Pet. App. 7a).

the Commission's jurisdiction" (Pet. App. 6a). Were the law otherwise, unregulated firms dealing with regulated industries listed in Section 5(a)(2) would be sheltered from any remedy under Section 5 for their illegal conduct affecting such industries.

Donnelley appears to suggest that this holding by the court of appeals conflicts with *Fruit Growers Express Inc.* v. *FTC*, 274 F. 205 (7th Cir. 1921), cert. dismissed, 261 U.S. 629 (1923). That case involved a contract between a supplier of railroad cars and certain common carriers by rail. Rail carriers are also excepted from the Commission's jurisdiction by Section 5(a)(2). The Seventh Circuit's decision setting aside the Commission's order turned on its conclusion that the carriers were necessary parties to the Commission's proceeding challenging the contract, who could not be joined because of the common carrier exception (274 F. at 206). *Fruit Growers* appears to be of questionable validity today.[2] In any event, in this case the court of appeals correctly distinguished *Fruit Growers* and ruled that "there is no claim that air carriers are necessary parties. The Commission has specifically found Donnelley's action to be unilateral abuse of its market position and has specifically found that air carriers were not parties to the allegedly illegal acts" (Pet. App. 7a). Thus, the fact that Donnelley's publishing activities affected air carrier competition does not defeat the Commission's jurisdiction.

3. The record refutes Donnelley's claim (Br. in Opp. 15-17) that the Commission's order is inconsistent with the First Amendment because, in Donnelley's view, the Official Airlines Guide is an informational

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[2] See *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 363, 365-366 (1940); *PepsiCo, Inc.* v. *FTC*, 472 F.2d 179 (2d Cir. 1972), cert. denied, 414 U.S. 876 (1973).

directory more analogous to a newspaper than to a simple listing of advertisements.[3] Even a cursory examination of the OAG confirms the Commission's finding that (Pet. App. 82a; footnote omitted):

> The OAG * * * is not a newspaper, and it is *not even* a "passive receptacle or conduit for news, comment, and advertising"—it is a passive receptacle only for "commercial" speech. Of course, the fact that the OAG is not a newspaper and contains only commercial speech does not mean that it is not entitled to First Amendment protection. See, *e.g.*, *Virginia State Bd. of Pharmacy*, [425 U.S. 748 (1976)]; *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). But it does mean that it is not entitled to the same high level of protection that is applicable to other forms of speech. See *Ohralik* v. *Ohio State Bar Ass'n.*, 436 U.S. 447 (1978); *Friedman* v. *Rogers*, 47 U.S.L.W. 4751 (S.Ct. Feb. 20, 1979) * * *.

Moreover, commercial speech that is integral to illegal activity is not protected by the First Amendment. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, No. 79-565 (June 20, 1980). While the Commission's order may curtail a measure of Donnelley's commercial editorial discretion that otherwise would enjoy constitutional protection, such a curtailment "is a necessary and, in cases such as this, unavoidable consequence of the violation." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 697 (1978). The First Amendment does not make it impossible to enforce against publishers federal statutes prohibiting unilateral or collective restraints of trade (*ibid.*). See *Lorain Journal*

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[3] In view of its restrictive reading of *Colgate*, the court of appeals did not reach Donnelley's contentions under the First Amendment (Pet. App. 2a).

Co. v. *United States*, 342 U.S. 143 (1951); *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139-140 (1969).

Donnelley also is in error in arguing (Br. in Opp. 17) that, "in the absence of any anticompetitive motive or intent," the First Amendment bars the government from compelling it to list commuter schedules. If Donnelley's conduct violates the competitive principles underlying Section 5, then the Commission may redress the injury by requiring publication of omitted information because it is dealing with commercial speech related to an unlawful activity. Moreover, in cases of anti-competitive refusals to deal, the question is not whether there is an absence of anti-competitive motive or intent, but whether the challenged conduct involves a commercial entity using commercial means to restrain competition. See Pet. 19-20. Cf. *Missouri* v. *National Organization for Women*, 620 F.2d 1301 (8th Cir.), cert. denied, No. 79-2037 (Oct. 6, 1980). As shown above (note 1, *supra*), Donnelley offered no justification whatsoever for its refusal to list the commuter carriers. Donnelley's arbitrary refusal to deal was not explained upon social or political grounds, or even commercial grounds. Accordingly, Donnelley's invocation (Br. in Opp. 16-17) of *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), is entirely misplaced. Donnelley's arbitrary exclusion of the commuter air carriers' schedules cannot be compared to the editorial judgment in the field of political speech at issue in *Tornillo*.[4] Cf. *Pittsburgh Press Co.*

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[4] There also is no merit in Donnelley's contention (Br. in Opp. 2) that "this case was moot as a matter of fact—if not as a matter of law—for more than three years prior to the entry of the Commission's order * * *." Section 5(b)

v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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of the Federal Trade Commission Act, 15 U.S.C. 45(b), expressly authorizes the Commission to issue cease-and-desist orders upon finding that any "person, partnership, or corporation *has been* or is using any unfair methods of competition * * *" (emphasis added). The law recognizes no distinction between factual and legal mootness. As to the separate question whether there exists sufficient likelihood of further violations to make injunctive relief necessary, the court of appeals properly held that this was a matter committed to the remedial discretion of the Commission as the trier of fact. It found "no evidence of an abuse of discretion since quite plainly the mere cessation of illegal activity—even coupled with a promise to obey the law in the future—will not defeat the entry of a cease and desist order" (Pet. App. 16a). See *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 634 (1953). Respondent has not challenged the court of appeals' determination on the necessity of a remedy.

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